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,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

BRIEF OF AMICI CURIAE ERWIN CHEMERINSKY, ANDREW D. BRADT, HELEN HERSHKOFF, LONNY HOFFMAN, E. FARISH PERCY, MICHAEL E. SOLIMINE, ADAM N. STEINMAN, JOAN STEINMAN, STEPHEN I. VLADECK, RHONDA WASSERMAN AND ANNE BLOOM IN SUPPORT OF RESPONDENT AND AFFIRMANCE

WILLIAM A. ROSSBACH
Counsel of Record
Rossbach Law, P.C.
P. O. Box 8988
Missoula, MT 59807
(406) 543-5156
bill@rossbachlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

INTERESTS OF AMICI CURIAE[1]

Dean Erwin Chemerinsky is the Jesse H. Choper Distinguished Professor of Law and Dean at the University of California, Berkeley, where he teaches Constitutional Law and Federal Courts. He is the author of *Federal Jurisdiction* (Aspen Law & Business 7th ed. 2016), a one-volume treatise on the jurisdiction of the federal courts, as well as several books on constitutional law.

Professor Andrew D. Bradt is a Professor of Law at the University of California, Berkeley, where he teaches Civil Procedure, Complex Litigation, Conflict of Laws, and Remedies.

Professor Helen Hershkoff is the Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties at New York University School of Law where she teaches Civil Procedure and Federal Courts. She is a co-author of a leading civil procedure casebook and of Volume 14 of Wright & Miller's *Federal Practice and Procedure* (4th ed. 2015).

Professor Lonny Hoffman is the Law Foundation Professor at the University of Houston Law Center, where he teaches and writes about civil

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[1] Letters of consent to the filing of this brief have been filed with the Court. Pursuant to this Court's Rule 37.6, counsel states that this brief was not authored in whole or in part by counsel for a party and that no one other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

procedure in federal and state courts. He is a member of the American Law Institute and has served as Chair of the Civil Procedure Section of the American Association of Law Schools.

Professor E. Farish Percy is the Jamie L. Whitten Chair of Law and Government at the University of Mississippi School of Law. She teaches civil procedure and has written extensively on removal jurisdiction.

Professor Michael E. Solimine is the Donald P. Klekamp Professor of Law at the University of Cincinnati College of Law. He teaches and writes on civil procedure, federal courts, and appellate procedure.

Professor Adam N. Steinman is the University Research Professor of Law at the University of Alabama School of Law. He teaches and writes in the areas of civil procedure and complex litigation and has authored numerous articles on appellate jurisdiction and appellate practice.

Professor Joan Steinman is the University Distinguished Professor Emerita and Professor of Law Emerita at the Chicago-Kent College of Law, Illinois Tech. She has taught and written in the areas of civil procedure, complex litigation, and appellate courts for over 41 years. For many years, she was responsible for two volumes of the Wright, et al., *Federal Practice and Procedure* treatise, and co-authored a casebook on appellate courts.

Professor Stephen I. Vladeck holds the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law and has written extensively about appellate jurisdiction in the federal courts, in particular.

Professor Rhonda Wasserman is a Professor of Law and John E. Murray Faculty Scholar at the University of Pittsburgh School of Law. She teaches Civil Procedure and Conflict of Laws.

Anne Bloom is the Executive Director of the Civil Justice Research Initiative at Berkeley Law. She teaches and writes on civil procedure, complex litigation, and torts.

Having devoted their careers to teaching and writing about civil procedure and the federal courts, and working for their improved administration, amici have a keen interest in seeing that federal courts function fairly and efficiently. It is equally important that the lower federal courts function only as Congress has authorized. If the court below is reversed, appellate panels will entertain appeals that Congress has specifically prohibited, upsetting a careful balance of federal and state judicial interests.

The institutional affiliations of the signatories are for identification purposes only.

INTRODUCTION

This case involves a lawsuit under Maryland law by the City of Baltimore against 26 oil and gas companies. It seeks damages and other relief stemming from the Petitioners' allegedly deceptive communications about the environmental impacts of their products. J.A. 23, 27-29, 87-131, 155-182. After the City of Baltimore filed suit in state court, two of the Petitioners removed the case to federal court, citing multiple grounds for removal including 28 U.S.C. 1442 (federal officer removal). J.A. 187-242. The federal trial court remanded the case to state court following a determination that there was no basis for federal subject matter jurisdiction, pursuant to Section 1442 or otherwise. Pet. App. 31a -81a.

Petitioners appealed to the Court of Appeals for the Fourth Circuit, which upheld the trial court's order of remand. *Mayor & City Council of Balt. v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2020). In accordance with the conclusion of nearly every federal court of appeals to consider the issue, the Fourth Circuit found, under 28 U.S.C. 1447(d), that it lacked authority to review any of the trial court's conclusions other than whether removal was appropriate under Section 1442. The Fourth Circuit then went on to affirm the trial court's conclusion that removal was not authorized in this case. Petitioners have now abandoned their arguments for federal officer removal under Section 1442. Instead, Petitioners filed a petition for certiorari in this Court, seeking review of the Fourth Circuit's conclusion that

federal appellate courts lack subject matter jurisdiction to review a district court's remand decision insofar as it is based on the district court's rejection of alternative grounds on which Petitioners purported to remove.

Amici file this brief as law professors and scholars who teach or have taught Civil Procedure and Federal Courts. Removal is a mechanism that allows a federal court to assume power over some actions that originally were filed in state court. The appropriate exercise of jurisdiction after removal holds important consequences for the balance of state and federal judicial power and Congress consistently has imposed limits upon the lower federal courts' power under this grant of authority. Congress also has made clear that removed actions that lack a legitimate basis of original federal subject matter jurisdiction must be remanded back to the state court in which the action was first filed. Relatedly, and significant to the question before this Court, Congress consistently has authorized appellate courts to exercise only limited review of district court orders that remand an action to state court. In particular, congressionally enacted limitations on federal subject matter jurisdiction prohibit *any* federal appellate court, including this Court, from revisiting a district court's order of remand except when the federal appellate court has been granted explicit authority to review the remand order.

As we explain below, Section 1442 (federal officer removal) and 1443 (civil rights removal) represent limited exceptions to Congress's general

prohibition of review of remand orders, on appeal or otherwise, as set out in Section 1447(d). When a defendant removes a case to federal court on the basis of Sections 1442 or 1443 along with other grounds for federal jurisdiction, and when the district court remands the case, the court of appeals has power to review only whether removal was proper under Sections 1442 or 1443. A defendant's inclusion of a contention under Sections 1442 or 1443 in its removal notice does not create power for the appellate court to review a non-reviewable ground for removal. Petitioners in this case no longer seek removal on the sole relevant ground for which appellate review is permitted by Section 1447(d), i.e., as a case removable under Section 1442. The decision of the Fourth Circuit must be affirmed and the case remanded to the state court in which it was filed.

SUMMARY OF THE ARGUMENT

Subject matter jurisdiction of federal courts is limited and can be granted only by the Constitution and Acts of Congress. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005). An Act of Congress specifically addresses and limits the subject matter jurisdiction of all federal appellate courts to review remand orders. *See* 28 U.S.C. 1447(d). With respect to review of remand orders, the statute provides that federal courts of appeals, including this Court, have subject matter jurisdiction only as to two limited grounds—known as federal officer and civil rights removal—under Sections 1442

and 1443, respectively. Neither of these narrow exceptions apply here.

As Petitioners' brief on the merits appears to concede, there is no plausible argument in this case for removal on either of these jurisdictional provisions. *See* Pet. Br. 28-29. Instead, Petitioners now seek to overturn the district court's order of remand on a theory that federal common law preempts the Plaintiff's state law claims. *See* Pet. Br. 38-45. It is axiomatic, under the well-pleaded complaint rule, that defendants cannot "magically transform[]" a plaintiff's complaint into one that involves federal claims. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 12, 15 (2003) (Scalia, J., dissenting) ("The [well-pleaded-complaint] rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." (quoting *Caterpillar Inc. v. Williams,* 482 U.S. 386 (1987))). Assuming for the sake of argument, however, that Petitioners' re-characterization of Respondent's complaint would be permissible and would illuminate the existence of a claim arising under federal law, it would not change the fact that Congress did not confer jurisdiction upon federal appellate courts, including this Court, to review non-reviewable grounds for removal of the action.

Petitioners' brief on the merits brushes past these congressionally enacted limits on the subject matter jurisdiction of federal appellate courts, focusing instead on a blinkered interpretation of the word "order" in an attempt to bootstrap non-

reviewable grounds for removal into this appeal. But the issue in this case is not the meaning of the word "order." The issue, as is stated clearly in the question presented, is the scope of federal appellate review over remand orders. Whatever a trial court's order of remand may contain, it cannot confer jurisdiction on appellate courts to review grounds for remand that Congress has not given federal appellate courts authority to review.

At bottom, Petitioners seek to rewrite Section 1447(d) to significantly expand the authority of federal courts of appeals (including this Court) to review a trial court's decision remanding a case to state court. As some of us have argued elsewhere, there may be good policy reasons to expand federal appellate jurisdiction of remand decisions. *See, e.g.*, Joan Steinman, *Removal, Remand, and Review in Pendent Claim and Pendent Party Cases*, 41 Vand. L. Rev. 923, 1004-11 (1988); Andrew D. Bradt, *Grable on the Ground: Mitigating Unchecked Jurisdictional Discretion*, 44 U.C. Davis L. Rev. 1153 (2010); Michael E. Solimine, *Removal, Remands, and Reforming Federal Appellate Review*, 58 Mo. L. Rev. 287 (1993). But, at present, the relevant statute does not permit review of the remand order in this case. Petitioners' arguments to the contrary suggest a fundamental misunderstanding of the limitations of federal court jurisdiction. Petitioners' interpretation of the congressionally enacted limitations on appellate review turn Section 1447 on its head and are expressly in conflict with the plain command of Congress.

ARGUMENT

A. Federal Courts Are Courts of Limited Jurisdiction. Only Congress Can Expand Federal Appellate Jurisdiction Over Remand Orders.

In our federal system, state courts have wide authority to exercise subject matter jurisdiction. Federal courts, in contrast, are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). They may hear only cases expressly authorized by the Constitution or Congress. *See* U.S. Const. Art. III, § 2; *Allapattah*, 545 U.S. at 552. Without an express grant of authority from Congress, a case is presumed to lie outside a federal court's jurisdiction. *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 377 (1994). Because of these limitations, parties cannot confer federal subject matter jurisdiction through consent, objections to subject matter jurisdiction cannot be waived, and federal courts have a duty to raise concerns as to subject matter jurisdiction on their own. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)).

In the early years of our nation, Congress was extremely cautious about exercising its Article III power to confer federal jurisdiction, primarily for reasons of federal-state comity. For example, although the Judiciary Act of 1789 authorized removal of some cases to federal court, it did not

authorize federal subject matter jurisdiction over cases arising under the federal Constitution or other federal laws and treaties. Richard H. Fallon, Jr., *et. al*., Hart and Wechsler's The Federal Courts and the Federal System 780 (7th ed. 2015); Erwin Chemerinsky, Federal Jurisdiction 11 (7th ed. 2016). Federal appellate jurisdiction also was extremely limited. For example, under the Judiciary Act of 1789, federal court review was not permitted of state court decisions ruling in favor of a person raising a federal law issue. Chemerinsky, *supra*, at 11.

The expansive reach of current federal subject matter jurisdiction is relatively new and was adopted largely in response to conflicts between federal and state officials after the Civil War. Fallon, *supra*, at 781. This expansion of federal court jurisdiction reached its peak in the 1875 Judiciary Act, which gave federal trial courts concurrent jurisdiction with that of State courts over a wide variety of cases and authorized either party to remove a case. Fallon, *supra*, at 782; Chemerinsky, *supra*, at 293.

In the years that followed, many more cases were filed in federal courts, raising concerns about the capacity of federal courts to manage the case load. Fallon, *supra*, at 782. Congress reacted by taking steps to narrow federal subject matter jurisdiction by, among other things, eliminating removal by plaintiffs. *See* Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 Emory L.J. 83, 100 (1994). It was also at this time that Congress determined that orders remanding

removed cases to the state courts could not be appealed. Fallon, *supra*, at 782.

Today, the general restriction on appeals of trial court orders remanding removed cases to state courts still stands, with limited exceptions. *See* 28 U.S.C. 1447(d). Perhaps not surprisingly, these limited exceptions reflect some of the concerns about federal interests, including potential bias against federal officers, that initially prompted Congress to significantly expand subject matter jurisdiction in the late 1800s. At the same time, the extremely narrow nature of the exceptions recall the ongoing concerns about comity and parity, which initially prompted Congress to be very restrictive in setting the scope of federal subject matter jurisdiction. *See Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. 336, 354-55 (1976) (Rehnquist, J., dissenting) (noting that Section 1447(d) reflects a "balanced concern" about the availability of a federal forum, on the one hand, and the interruption and delay caused by appellate review, on the other hand); *see also United States v. Rice*, 327 U.S. 742, 752 (1946) (noting that the statutory bar on review of remand orders serves "the Congressional policy of avoiding interruption of the litigation of the merits of removed causes, properly begun in state courts"); Bradt, *supra*, at 1198.

While Congress's approach to balancing federal and state interests in the context of federal subject matter jurisdiction has changed over time, the basic principles governing federal subject matter

jurisdiction have not changed. As was the case at our nation's founding, a federal court today cannot hear a case it is not authorized to consider by the Constitution and federal statute. And, in the context of removal, "Congress has placed broad restrictions on the power of federal appellate courts to review district court orders remanding removed cases to state court." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995); *see also Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 229 (2007) ("The authority of appellate courts to review district-court orders remanding removed cases to state court is substantially limited by statute.").

B. The Plain Text of the Statute Precludes Federal Appellate Subject Matter Jurisdiction in this Case.

Under 28 U.S.C. § 1447(d), trial courts are given nearly exclusive authority to determine whether federal subject matter jurisdiction is present and supports removal of the action from state court, or whether the action should be returned to state court. Section 1447(d) provides:

> *"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) (emphasis added).

As Petitioners concede, this language unambiguously precludes the exercise of appellate jurisdiction to review an order remanding a removed case to state court, unless one of two narrow exceptions applies —i.e., that the case involves federal officers or defendants acting under federal officers (Section 1442) or arises out of civil rights violations (Section 1443). Section 1447(d) otherwise imposes a broad bar on appellate jurisdiction to review a district court's remand decisions. *See Things Remembered*, 516 U.S. 124. Section 1442 and 1443 represent narrow exceptions to the bar on review. It is difficult to imagine how Congress could have expressed itself more clearly. *See Osborn v. Haley*, 549 U.S. 225, 262 (2007) (Scalia, J., dissenting) ("Few statutes read more clearly than 28 U.S.C. § 1447(d)").

As Justice Scalia explained in *Powerex*:

> "Section 1447(d) 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 of the district court to which the cause is removed. Appellate courts must take that jurisdictional prescription seriously, however pressing the merits of the appeal might seem."

Powerex, 551 U.S. at 238-39 (cleaned up).

Nevertheless, Petitioners read the statute to achieve a result that is the *opposite* of the plain language of the statute, arguing that the narrow exceptions should allow Petitioners to overcome the broad bar on review and permit federal appellate courts to review on appeal all of the grounds for removal that the district court rejected. This reading subverts the clear purpose of Section 1447(d) to withhold appellate jurisdiction and narrowly limit the reviewability of remand orders except as to specific and limited jurisdictional grants. The whole point of these statutory provisions was to make Sections 1442 and 1443 provide exceptions to the Section 1447(d) bar on federal appellate review of subject matter determinations by trial courts; they do not open a door to general appellate review of all other grounds for removal that the district court rejected. Petitioners' argument would turn the statutory prohibition on review upside down and effect a vast and impermissible expansion of federal appellate jurisdiction. This Court should not accept Petitioners' invitation to supplement the express statutory exceptions with additional, judicially created exceptions to Congress's no-appeal rule.

1. The Relevant Issue Is Not the Meaning of the Word "Order" But Rather the Scope of Congressionally Authorized Federal Appellate Review.

Petitioners' textual argument turns on an expansive reading of the word "order." Petitioners took a "kitchen sink" approach to removal, referring

to multiple different potential bases for jurisdiction, some of which they later abandoned. They maintain that this Court has authority to hear this appeal because the trial court's remand "order" rejected both reviewable and non-reviewable grounds of jurisdiction. But the district court's order cannot create appellate jurisdiction that Congress has not conferred, and Congress did not authorize appellate jurisdiction to review the non-reviewable grounds of jurisdiction set out in the order. Contrary to Petitioners' assertion, the question is not the scope of the order, but rather the scope of the authority of federal courts of appeal to review the order. *See Thermtron*, 423 U.S. at 353-54 (1976) (Rehnquist, J., dissenting) (noting that the "principal" issue is whether the Court has jurisdiction). And, here, the statute could not be clearer: federal courts of appeals have power to review a trial court's order of remand only to the extent it raises one of the two narrow grounds for jurisdiction set out in Sections 1442 and 1443.

Section 1447(d) is fundamentally about a limitation on appellate review. As Justice Thomas explained in *Things Remembered*, if a district court's remand is based on lack of subject matter jurisdiction "a court of appeals lacks jurisdiction to entertain an appeal." *Things Remembered*, 516 U.S. at 127-28. Just as in *Things Remembered*, "§ 1447(d) bars appellate review of the remand order in this case," unless the remand was based on a lack of jurisdiction under Sections 1442 or 1443— and Petitioners in this case concede that these bases for jurisdiction are not at issue in the appeal. *See id*. At 128; *see also*

Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 638 (2009).

Nothing about the subsequent legislative history of Section 1447(d) changes this fundamental analysis. Justice Thomas wrote the opinion of this Court in *Things Remembered* in 1995. Then, as now, Section 1447(d) included an exception to the general bar to appellate review for cases removed pursuant to Section 1443. Subsequently, in 2011, Congress amended Section 1447(d) to add a second exception for cases removed pursuant to Section 1442, with the addition of "1442 or" to Section 1447. Section 1447(d), as articulated by this Court in *Things Remembered*, continues to unambiguously bar appellate review of remand orders in most instances. *See Things Remembered*, 516 U.S. at 128 (noting that, "[a]bsent a clear statutory command to the contrary, [this Court assumes] that Congress is aware of the universality of the practice of denying appellate review of remand orders when Congress creates a new ground for removal" (cleaned up) (citing *United States v. Rice*, 327 U.S. 742 (1946))).

This Court's holding in *Yamaha Motor Corp., U.S.A. v. Calhoun* did not change the plain meaning of Section 1447(d). *See* 516 U.S. 199 (1996). It is true that *Yamaha* involved an "order" and that this Court held, in that instance, that the appellate court could address any issue fairly included within that order. *Id.* at 205. But *Yamaha* involved the meaning of 28 U.S.C. § 1292(b), which authorizes review of otherwise unreviewable interlocutory orders in cases in which the subject matter jurisdiction of federal

courts *has already been established*. This case, in contrast, involves a question about whether federal subject matter jurisdiction at the appellate level exists *at all*, after it was found not to exist at all at the district court level. And, Section 1447 makes clear that Congress intended for district courts to make that initial subject matter determination, with express limitations on appellate review. As the United States notes in its brief, Section 1447(d)'s appellate review bar is an exception to ordinary principles of appellate review. *See* Brief of the U.S. at 16. *Yamaha* is inapposite.

The policy recommendations of a leading civil procedure treatise also provide no support for Petitioners' interpretation of the word "order" in this case. *See* Pet. Br. 18 (citing Edward H. Cooper, 15A Charles Alan Wright et al, *Federal Practice & Procedure* § 3914.11, at 706 (2d ed. 1992) (Wright & Miller). While Petitioners claim this treatise "agrees" with their interpretation, it is more accurate to say that the treatise is recommending that appellate review *should* be expanded to all grounds of appeal, rather than endorsing Petitioners' expansive interpretation of the plain text of Section 1447(d). *See* Edward H. Cooper, 15A *Wright & Miller Federal Practice & Procedure* § 3914.11 (2014 rev.) (suggesting that "review *should* . . . be extended" (emphasis added) and providing a list of policy reasons in support of this recommendation). A number of law professors agree with this view, including some of the professors who have joined this brief, but that does not change Section 1447(d)'s current unambiguous prohibition on review.

It is true that there have been times when this Court has interpreted Section 1447(d) "to cover less than its words alone suggest." *Powerex*, 551 U.S. at 229. For example, when an earlier version of Section 1447(c) was in effect, the Court "interpreted § 1447(d) to preclude review only of remands for lack of subject-matter jurisdiction and for defects in removal procedure." *Id.* at 229 (citing *Quackenbush v. Allstate Ins. Co*, 517 U.S. 706, 711-712 (1996)); *Things Remembered*, 516 U.S. at 127-128). But despite these expansions of the universe of remand orders that may be reviewed on appeal, the Court has steadfastly maintained Section 1447(d)'s prohibition of appellate review of remands based on lack of subject matter jurisdiction. *See Powerex*, 551 U.S. 224.

As this Court's jurisprudence has recognized, while defendants have the right to remove various cases, Congress did not regard defendants' right to a federal forum as so valuable as to overcome the values of immediate adjudication in a State court and conservation of federal appellate resources. Indeed, the Court has indicated that appellate review is unavailable so long as the district court's determination that the removed case was outside federal subject matter jurisdiction was "colorable." *Powerex*, 551 U.S. at 234 (holding that when "the district court relied upon a ground that is colorably characterized as subject-matter jurisdiction, appellate review is barred by § 1447(d)").

The remand order from the district court in this case was clearly based on lack of subject matter jurisdiction. Under these circumstances, Section 1447 still means what it says. *See Carlsbad Tech.*, 556 U.S. at 643 (Scalia, J., concurring) ("[I]t would not be unreasonable to believe that 28 U.S.C. § 1447(d) means what it says; and what it says is no appellate review of remand orders." (cleaned up) (citing *Thermtron,* 423 U.S. at 354 (Rehnquist, J., dissenting)). Appellate courts do not have authority to review the district court's decision to remand for lack of jurisdiction on grounds other than the subsequently withdrawn section 1442 removal. *See Osborn v. Haley*, 549 U.S. at 240 (noting that remand orders issued under Section 1447(c) and invoking lack of subject matter jurisdiction "are immune from review").

2. Whatever Meaning One Ascribes to the Word "Order" in Section 1447(d), It Cannot Be That Petitioners' Non-Colorable Listing of an Exception in Their Notice of Removal Creates Appellate Power to Review Non-Reviewable Grounds.

Petitioners' brief on the merits does not seriously dispute any of the foregoing. Instead, it encourages the Court to adopt what is essentially an upside-down interpretation of Section 1447(d). According to Petitioners' view, appellate review of remand orders is triggered—and applies to every remand order in its entirety—whenever a district court rejects Petitioner's efforts to remove under

Section 1442 or 1443 and the trial court's remand order simultaneously rejects other asserted grounds to remove. Moreover, according to Petitioners, this expansive approach to appellate review of remand should be permitted, even when the defendant has abandoned any serious argument in favor of removal on the grounds of either of the statutorily created exceptions.

Petitioners' argument runs contrary to accepted rules governing the interpretation of jurisdictional statutes. First, Petitioners' interpretation ignores the general prescription to read statutes conferring federal jurisdiction narrowly. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1573 (2016). Second, the proposed interpretation would effect an end-run around Section 1447(d)'s general bar on appellate review of remand orders based on subject matter jurisdiction, and in so doing would burden federal courts of appeals with the often complex issues of subject matter jurisdiction that Congress sought to avoid imposing on the federal appeals courts. Petitioners' proposed interpretation would allow defendants to effect these results by simply asserting—and then abandoning—meritless, if not frivolous, invocations of federal officer or civil rights removal authorizations.

We underscore that these rules of interpretation reflect important concerns of federalism, which support a strict construction of federal jurisdictional statutes in order to maintain respect for state judicial authority. *Shamrock Oil &*

Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941). As this Court has explained, "Out of respect for state courts, [the] Court has time and again declined to construe federal jurisdictional statutes more expansively than their language, most fairly read, requires. . . . That interpretive stance serves . . . to help maintain the constitutional balance between state and federal judiciaries." *Merrill Lynch*, 136 S. Ct. at 1573; *Healy v. Ratta*, 292 U.S. 263, 270 (1934) ("Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they [the federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined."); *see also Beneficial Nat'l Bank v. Anderson*, 539 U.S. at 18 (Scalia, J., dissenting) (noting the "long tradition of respect for the autonomy and authority of state courts). Particularly in light of this rule of strict construction of federal jurisdictional statutes, it would strain credulity to adopt Petitioners' broad reading of the word "order" to all but eviscerate Section 1447(d)'s general bar on appellate review of remand orders based upon lack of subject matter jurisdiction.

The following hypothetical illustrates just how problematic Petitioners' interpretation of Section 1447(d) is from the standpoint of ordinary textual interpretation. Imagine that a judge instructs her clerks, "While I'm on my family vacation, phone calls to my cell phone are not allowed under any circumstances, except that calls are allowed if there is a problem with the *Johnson* case." Any clerk who called the judge about the *Johnson* case would not dare raise other additional issues. Although the

judge technically authorized "calls," the scope of any call is clearly limited to the *Johnson* case. Yet the interpretation that Petitioners advocate here is even worse. Petitioners take the position of a clerk who calls saying, "There's not actually a real problem with the *Johnson* case, but while I have you on the phone . . ." Such a call would be unacceptable to the judge, and in the same way, Petitioners should not be permitted to use a non-meritorious claim of federal officer jurisdiction to expand the limited scope of appellate jurisdiction set out in Section 1447(d).

While Petitioners deny that their citation of the federal officer exception in their notice of removal was frivolous in this case, they do not appear at this point to be seriously arguing for removal on this ground. Petitioners devoted only a fraction of their briefing in the Fourth Circuit to the federal officer argument, and they have all but abandoned their federal officer argument here. Instead, nearly all of the discussion in support of removal contained in Petitioners' Brief on the merits focuses on arguments related to federal common law and the preemption of state common law claims. Whatever the word "order" means, it cannot permit Petitioners to bootstrap non-reviewable grounds for remand into an appeal through the frivolous or otherwise non-meritorious inclusion of reviewable grounds in its Notice of Removal. *See Bell v. Hood*, 327 U.S. 678, 682 (1946) ("a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for

the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous").

It is not enough to say, as Petitioners claim, that the problem could be solved by the aggressive use of sanctions against parties that seek to remove on frivolous grounds. Numerous studies have demonstrated that the threat of sanctions has not deterred defendants from erroneously removing cases to federal court.[2]

Petitioners' proposed solution—relying on satellite sanction litigation—would increase costs for

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[2] *See* E. Farish Percy*, Inefficient Litigation Over Forum: The Unintended Consequence of the JVCA's "Bad Faith" Exception to the Bar on Removal of Diversity Cases After One Year*, 71 Okla. L. Rev. 595, 602-03 (2019) (empirical study demonstrated that the remand rate for cases removed pursuant to the "bad faith" exception to the bar on removal of diversity cases after one year was 85%); E. Farish Percy, *The Tedford Equitable Exception Permitting Removal of Diversity of Cases After One Year: A Welcome Development or the Opening of Pandora's Box?*, 63 Baylor L. Rev. 146, 154-56 (2011) (empirical study revealed a remand rate of more than 83% in cases removed pursuant to the *Tedford* equitable exception to the one-year bar on removal of diversity cases); Theodore Eisenberg & Trevor W. Morrison*, Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal,* 2 J. Empirical Legal Stud. 551, 568-76 (2005) (concluding that the empirical evidence of numerous erroneous removals in some jurisdictions can be attributed to defendants' increasingly abusive removal tactics, at least in part); Christopher Terranova, *Erroneous Removal as a Tool for Silent Tort Reform: An Empirical Analysis of Fee Awards and Fraudulent Joinder*, 44 Willamette L. Rev. 799, 831 (2008) (empirical study demonstrated that the remand rate for cases in which the removing defendant asserted fraudulent joinder was more than 59%).

plaintiffs, drain resources from the district and appellate courts, and create administrative problems (among other things, although federal courts may impose sanctions even after an action has been dismissed on jurisdictional grounds, federal sanction rules do not apply to state courts or state judges). Nor does this proposal give due respect to Congress and the clear limitations that it placed on appellate review of remand orders.

The plain language of Section 1447(d) expressly bars federal courts from reviewing remand orders except as to civil rights or federal officer grounds for removal. Sections 1442 and 1443 represent limited exceptions to the otherwise nonexistent subject matter jurisdiction for appellate review of remand orders under Section 1447(c). These exceptions should not be permitted to expand federal appellate subject matter jurisdiction to matters as to which Congress manifestly intended to deny it.

3. *Allapattah* Supports a Narrow Reading of Section 1447(d)'s Exceptions to the General Prohibition on Federal Appellate Review of District Court Remand Orders.

In its Brief in Support of Petitioners, the United States makes several arguments in favor of a broad reading of the word "order." For example, the United States suggests that orders granting remand should be treated the same as orders denying remand. *See* Brief of the U.S. at 21. But in light of

the general principles governing federal subject matter jurisdiction, these arguments make no sense.

Exxon Mobil Corp. v. Allapattah Servs., Inc., a case involving issues of supplemental jurisdiction, is instructive on this point. *See* 545 U.S. at 556. *Allapattah* involved an interpretation of Section 1367(a)'s provision for supplemental jurisdiction "in any civil action of which the district courts have original jurisdiction." *Id.* at 558. Citing the general principle that statutes involving subject matter jurisdiction must not be construed expansively, this Court emphasized that we must look closely at the text of the statute, including what claims are barred from federal subject matter jurisdiction by Section 1367(b). *Id.* ("[W]e must examine the statute's text in light of context, structure, and related statutory provisions.").

In *Allapattah*, the Court concluded that the presence of a single claim in a complaint that is within the original jurisdiction of the federal court could provide the basis for the court's exercise of power over a "related" claim that forms a part of the same constitutional case but that otherwise would fall outside original federal jurisdiction. *See id.* At 559. As the Court emphasized, its holding resulted from a close reading of Section 1367(a), which provided a "broad jurisdictional grant." *Id.* at 559, 561. But, contrary to the contentions of Petitioners and the United States, the opposite is true in this case.

As in *Allapattah*, the Court here must look closely at Congressional language to determine how Section 1447(d) fits within the broader statutory framework, including Section 1447(c), which authorizes trial courts to issue remand orders. While Section 1367(a) provides a broad jurisdictional *grant*, Section 1447(d) imposes a broad appellate jurisdictional *bar*.

Petitioners' proposed interpretation of Section 1447(d) would essentially turn the analysis of *Allapattah* upside down and is completely at odds with the basic principles of federal subject matter jurisdiction. *See Kokkonen v. Guardian Life Ins*. 511 U.S. at 377 (noting that, without an express grant of authority from Congress, a case is presumed to lie outside a federal court's jurisdiction). In *Allapattah*, an express grant of authority was present. But, in this case, the opposite is true—an express and broad prohibition of appellate review of remand orders is what one finds.

Remarkably, the United States also claims that no one has offered a "persuasive defense" for a narrow construction of Section 1447(d). *See* Brief of the U.S. at 13. Once again, the argument is upside down. It is not necessary for Respondent or this Court to offer policy arguments in favor of a narrow reading of the statute; the basic principles of federal subject matter jurisdiction require a narrow reading. Moreover, in *Osborn v. Haley*, Justice Scalia provided a very persuasive explanation for why this Court is not permitted to construe Section 1447(d) broadly, as Petitioners and the United States urge. *See* 549 U.S.

225. After first noting that "few statutes read more clearly than 28 U.S.C. § 1447(d)," Justice Scalia emphasized that the bar on appellate review is "not just hortatory; it is jurisdictional." *Id.* at 262-63. Justice Scalia then urged the Court to refrain from "eviscerat[ing]" what remains of "Congress's Court-limiting command," and reminded us that Section 1447(d)'s Court-limiting command "applies with full force" even to "erroneous remand orders." *Id.* at 263, 265.

For similar reasons, the United States' contention that orders "'cannot be disaggregated' into reviewable and unreviewable rulings" also is off-track. *See* Brief of the United States at 13-14. The United States' argument cites *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 646 n. 13 (2006), but actually relies on *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934) (permitting review of certain district court determinations that precede a remand order). However, as Justice Scalia noted in *Osborn v Haley*, the "continuing vitality of *Waco* is dubious in light of more recent precedents." 549 U.S. at 266 (citing *Kircher*). More fundamentally, as Justice Scalia emphasized, *Waco* can be distinguished from those cases, such as the instant one, where appellate court interference would subvert the remand order. *Id.* at 267. The reason for this is clear. Congress has determined that, absent very narrow exceptions, remand orders are *exclusively* the province of the district court.

Notably, Justice Scalia's discussion in *Osborn* also presciently addressed the United States' suggestion that, if Congress does not like the results of the more expansive reading of the statute Petitioners are encouraging the Court to adopt, Congress can simply amend the statute again. *See* Brief of the United States at 30 (arguing that "if experience reveals" that the proposed interpretation "results in gamesmanship" or "undo delays," the solution will lie with Congress). But, as Justice Scalia commented, "it is hard to imagine new statutory language accomplishing the desired result any more clearly than § 1447(d) already does." *Osborn v. Haley*, 549 U.S. at 268-69.

C. Petitioners' Federal Common Law Arguments Would Effectuate a Significant Shift in Decisional Authority from State to Federal Courts.

Petitioners' brief on the merits all but concedes that there is no plausible argument in this case for removal on the grounds of either of the two permissible exceptions allowing appellate review under Section 1447(d). *See* Pet. Br. 28-29. Instead, Petitioners now seek to overturn the district court's order of remand alleging a basis for jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction) on a theory that federal common law preempts the plaintiff's state law claims. *See* Pet. Br. 38-45. Petitioners' arguments would effectuate a significant shift in decisional authority from state to federal courts, with potentially far-reaching implications for

federal-state comity, and would expand the defense of preemption far beyond current precedent.

Petitioners' arguments would also implicate the well-pleaded complaint rule. *See* Bradt, *supra*, at 1161 ("The Court has long endorsed numerous limitations on statutory federal-question jurisdiction, most prominently the well-pleaded complaint rule, which requires that the basis for federal jurisdiction appear on the face of the plaintiff's complaint and not in 'some anticipated defense to his cause of action.'" (quoting *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908))). On the face of the complaint in this case, all of the claims in this case sound in Maryland law. *See* Pet. Br. at 44 (urging the Court to look beyond the pleadings). It is well established that it must be clear from the face of the plaintiff's complaint that there is a federal question. *Louisville & Nashville Railroad v. Motley*, 211 U.S. 149. Although the Court has recognized a narrow basis for the exercise of federal jurisdiction over claims that are created by state law, *Gunn v. Minton*, 568 U.S. 251 (2013), "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986).

Finally, and most fundamentally from a civil procedure perspective, Petitioners have not properly raised the issue of jurisdiction under § 1331 for review. For these reasons, and particularly in light of the potentially far-reaching implications for federal-state comity, we urge the Court to decline Petitioners' invitation to consider these issues now.

CONCLUSION

The authority to expand federal subject matter jurisdiction lies with Congress, pursuant to Article III of the Constitution. If Petitioners want to rebalance federal-state jurisdiction in a new way, it is appropriate for them to raise the issues with Congress, not here. Petitioners should not be permitted to bootstrap their way into an appeal of an otherwise unreviewable district court order simply by referencing meritless grounds for removal, which they are no longer seriously defending. *See* discussion *supra*, at 17-21. Contrary to Petitioners' contentions, judges may not "suppress" Section 1447(d)'s bar on appellate review even if "they think Congress undervalued or overlooked" its consequences and even when there is a conflict in the lower courts. *Powerex,* 551 U.S. at 238 n.5. Section 1447(d) does not permit the assertion of appellate jurisdiction in this case.

Respectfully submitted,

WILLIAM A. ROSSBACH
Counsel of Record
Rossbach Law, P.C.
P. O. Box 8988
Missoula, MT 59807
(406) 543-5156
bill@rossbachlaw.com

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