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 WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF 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 if removal is premised 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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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. So WLF has regularly appeared as *amicus curiae* before this and other federal courts in important removal-jurisdiction cases. *E.g.*, *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81 (2014); *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286 (5th Cir. 2020) (*en banc*).

This case raises an important removal-jurisdiction question. By holding that its appellate jurisdiction was limited to the federal-officer removal issue, the Fourth Circuit avoided addressing whether climate-change litigation presents a federal question. This abdication of its responsibility to review the District Court's order denied Petitioners their right to have this federal-law question decided by a federal judge with Article III protections. Rather, state court judges amenable to local pressures will decide that question if this Court affirms. Such a decision would go against the constitutional design that has served us well for over 230 years.

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[1] No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, helped pay for the brief's preparation or submission. All parties filed blanket consents for the filing of *amicus curiae* briefs.

STATEMENT

In 2017, many local and state governments sued energy companies in state court. *See* Jeremy Hodges *et al.*, *Climate Change Warriors' Latest Weapon of Choice is Litigation*, Bloomberg (May 24, 2018), https://bloom.bg/3fczCz8. Those suits alleged that the defendant energy companies contributed to global warming by extracting, producing, and selling fossil fuels. *See*, *e.g.*, *id.* Although these energy companies provided vast benefits to these governments and their citizens, the governments thought it was time to pounce.

Seeing this flood of lawsuits, in 2018 Respondent sued Petitioners in Maryland state court. (Pet. App. 2a.) Respondent claims that Petitioners "substantially contributed to climate change by producing, promoting, and (misleadingly) marketing fossil fuel products long after learning the dangers associated with them." (*Id.* at 3a; *see generally* J.A. 23-182.)

Petitioners removed this case to the District of Maryland because (1) they acted at the direction of federal officers, *see* 28 U.S.C. § 1442(a); (2) removal was proper under 28 U.S.C. §§ 1331 and 1441(a) because (i) Respondent's claims arise under federal common law and (ii) the federal interest at stake in the litigation is sufficient for federal-question jurisdiction; (3) Respondent's claims are completely preempted by federal law; (4) Respondent's claims relate to Bankruptcy cases, 28 U.S.C. §§ 1334(b), 1452(a); and (5) Respondent's claims sound in admiralty, 28 U.S.C. § 1333(1). (J.A. 187-241.)

Respondent moved to remand the case to state court, arguing that the District Court lacked subject-matter jurisdiction over the claims. Finding that removal was improper, the District Court granted the motion. (Pet. App. 31a-81a.) Maintaining that removal was appropriate for the reasons outlined above, Petitioners appealed that decision to the Fourth Circuit. *See generally* Brief for Appellants, *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2020) (No. 19-1644), 2019 WL 3491806.

The Fourth Circuit held that removal was improper under Section 1442. (Pet. App. 11a-30a.) But it declined to address Petitioners' other grounds for removal. According to the Fourth Circuit, 28 U.S.C. § 1447(d) permitted review of only the federal-officer removal claim. (Pet. App. 6a-10a.) Relying on its old, inapposite precedent—rather than this Court's more recent precedent—the Fourth Circuit held that it lacked appellate jurisdiction over Petitioners' remaining arguments. (*See id.*) It therefore did not address the merits of those arguments. This Court granted certiorari to resolve the circuit split on this important issue.

SUMMARY OF ARGUMENT

A. Since our nation's founding, Congress has consistently recognized the importance of having federal courts hear important federal cases. The Founders understood the problems posed by having politically vulnerable state judges decide questions of national importance. So when establishing the lower federal courts in 1789, they provided both for removal of cases to federal court and for appellate review of

orders remanding cases to state courts. Over the past 230 years, giving federal judges this authority has served our nation well.

B. Congress's expansion of district courts' statutory jurisdiction accelerated around the Civil War. The biggest crisis our nation faced confirmed the Founders' fears about having state court judges decide important cases. Yet the resulting flood in cases overwhelmed the federal judiciary in short order. So Congress dammed the flood gates by barring appeals of remand orders.

C. But changes to the federal judiciary in the late-19th century reveal why today's bar on appellate review of remand orders differs from that of the original bar. Congress made a policy choice that avoiding delayed merits adjudication sometimes outweighs the benefits of having federal courts decide cases.

This rationale for barring appellate review of some remand orders does not apply here. Respondent and the Fourth Circuit concede that courts of appeals can decide whether removal was proper under Section 1442 or 1443. Adding issues will not delay merits adjudication.

Because the purpose for the appellate-review bar does not apply to remand orders addressing several grounds for removal, this Court should broadly read Section 1447(d)'s second clause. That reading furthers Congress's purpose of ensuring federal judges—not state court judges influenced by local politics—decide important federal cases.

D. This broad reading also tracks with the unmistakable trend of the Court and Congress of expanding courts of appeals' ability to review remand orders. Although Section 1447(d) generally prohibits such review, there are several exceptions to this general rule. This history suggests Congress wants a plain-text reading of Section 1447(d)'s second clause.

ARGUMENT

THE HISTORY OF FEDERAL JURISDICTION COMPELS A PLAIN-TEXT READING OF SECTION 1447(d)'S SECOND CLAUSE.

The Constitution grants federal courts jurisdiction over nine types of cases or controversies. U.S. Const. art. III, §2 cl. 1; *see* Erwin Chemerinsky, Federal Jurisdiction, 260 (4th ed. 2003). To exercise federal jurisdiction, district courts must have both constitutional and statutory jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). When both prerequisites are satisfied, "federal courts" have a "general duty to exercise the jurisdiction that is conferred upon them." *Hamdan v. Rumsfeld*, 548 U.S. 557, 589 (2006) (quotation omitted). The history of federal jurisdiction shows that Congress has consistently expanded statutory jurisdiction. Allowing district courts to remand properly removed cases to state courts without appellate review invites abdication of this core responsibility.

A. The Founders Recognized The Need For Federal Courts To Resolve Important Cases.

Even before ratification, the Founders understood the importance of allowing federal judges—who enjoy life tenure and a secure salary—to hear certain cases. Alexander Hamilton explained that "State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws." *The Federalist* No. 81, 547 (Alexander Hamilton) (Jacob Cooke ed. 1961). And "some of the most important and avowed purposes of the proposed government" would disappear if "the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor." *The Federalist* No. 82, 556 (Alexander Hamilton) (Jacob Cooke ed. 1961); *see* Felix Frankfurter & James Landis, *The Business of the Supreme Court*, 38 Harv. L. Rev. 1005, 1014 (1925) (Federal jurisdiction is necessary to protect "against the obstructions and prejudices of local authorities").

The Constitution is silent about removing cases from state court to federal court. Yet removal is not a new procedure: Congress provided for removal when it created the inferior federal courts. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79. Like today's removal statute, once a defendant removed a case to federal court the state court could "proceed no further in the cause." *Id.*

Some States, however, soon began interfering with federal officers. For example, New England States interfered with enforcement of customs laws

during the War of 1812. *See Willingham v. Morgan*, 395 U.S. 402, 405 (1969). Federal officers could not remove the resulting lawsuits to federal court because removal was permitted only in diversity cases. *See* Judiciary Act of 1789, ch. 20, § 12, 1 Stat. at 79. So Congress provided for federal-officer removal starting in 1815. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198-99. That first federal-officer removal statute expired when the war ended. Yet diversity removal remained.

For the next 60 years, the Court assumed that it could review lower court orders remanding cases to state court. *See*, *e.g.*, *Bushnell v. Kennedy*, 76 U.S. 387, 394 (1869). The lack of judicial debate on the appealability of these orders suggests that the Founders thought it obvious that appellate courts should review remand orders.

This founding-era history shows that the Constitution was designed to give federal courts jurisdiction over disputes implicating federal interests. This case implicates such an important federal interest—claims about climate change. Broadly reading the exception to the general bar on appellate review of remand orders reflects our Founders' understanding of Article III. In contrast, the Fourth Circuit's ruling conflicts with Article III's purpose.

B. Congress's Preference For Federal Resolution Of Important Cases Was Reinforced During And After The Civil War.

1. For the next five decades, removal was once again generally limited to diversity actions. But federal jurisdiction underwent a major overhaul during and after the Civil War. In 1863, Congress allowed removal of cases to federal court when they arose from actions authorized by the Executive or Legislative Branch. *See* Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 755, 756. This expansion of removal jurisdiction, during the most trying time in our nation's history, again showed the importance of having federal courts resolve cases of national importance.

After the Civil War, Congress again expanded removal jurisdiction so that defendants could remove civil-rights cases to federal court. *See* Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27, 27. This statute was the predecessor to 28 U.S.C. § 1443. The two statutes mentioned in Section 1447(d) thus have long histories. This Court should consider this history of civil-rights and federal-officer removal statutes when interpreting Section 1447(d).

And like the Framers at the Constitutional Convention, post-Civil War legislators recognized the risk of having state court judges decide important cases: Congress provided for removal of actions absent complete diversity when the plaintiff joined a non-diverse defendant to defeat federal jurisdiction. Act of July 27, 1866, ch. 288, 14 Stat. 306, 306-07.

Congress soon expanded the ability to remove cases to federal court when a nonresident plaintiff or defendant believed that, because of "prejudice or local influence," he could not obtain "justice in such State court." Act of Mar. 2, 1867, ch. 196, 14 Stat. 558, 559.

This shows that Congress has repeatedly recognized the risk of allowing state court judges to decide cases of national import. It has thus conferred statutory jurisdiction on lower federal courts to hear these cases and permitted removal of such cases to federal court.

2. Congress greatly expanded the statutory jurisdiction of federal courts during Reconstruction. For the first time in over 170 years, it gave lower courts subject-matter jurisdiction over cases arising under the laws of the United States. *See* Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470, 470; *cf.* Judiciary Act of 1801, ch. 4, § 11, 2 Stat. 89, 92 (conferring that subject-matter jurisdiction); Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132 (revoking it).

At the same time, Congress expanded removal jurisdiction: It provided that any party could remove a case to federal court when the case arose "under the Constitution or laws of the United States, or treaties." Judiciary Act of 1875, ch. 137, § 2, 18 Stat. at 470-71. Congress realized, however, that this great expansion of federal jurisdiction could overburden federal courts. So if a court determined that a removed case did "not really and substantially involve a dispute or controversy properly within the federal court's jurisdiction" it should dismiss the action or remand it to state court. *Id.* § 5, 18 Stat. at 472.

The Court has recognized that the Judiciary Act of 1875 was groundbreaking: It "made some radical changes in the law regulating removals." *Little York Gold Washing & Water Co. v. Keyes*, 96 U.S. 199, 204 (1877). The Court similarly recognized that the new removal statute raised "[i]mportant questions of practice" that "would not be easy" to resolve. *Id.*

This expansive "removal legislation * * * provide[d] a congenial forum to enforce and give meaning to newly enacted federal legislation and the Civil War Amendments" and ensured "a federal haven at the trial level for burgeoning industrial, financial, and other 'entrepreneurial' interests." Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 Iowa L. Rev. 717, 727 (1986) (citing Frankfurter & Landis, 39 Harv. L. Rev. at 64-65 & n.31, 91-93; Harold Hyman, A More Perfect Union, 536-40 (1973); Stanley Kutler, Judicial Power and Reconstruction Politics, 157-58 (1968); William Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 Am. J. Legal Hist. 333, 341 (1969)).

The Judiciary Act of 1875 also changed how parties could seek appellate review of remand orders. In the years prior, "orders of remand were not reviewable by appeal or writ of error for want of a final judgment." *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 346 (1976) (citing *Chicago & A.R. Co. v. Wiswall*, 90 U.S. 507 (1874)), *abrogated on other grounds*, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).

But parties could still seek judicial review of remand orders through a writ of mandamus from the Supreme Court. *See Chicago & A.R.*, 90 U.S. at 508 ("The remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done." (citations omitted)).

This short-lived process changed in 1875 when Congress provided that parties could appeal remand orders to the Supreme Court. Judiciary Act of 1875, ch. 137, § 5, 18 Stat. at 472. This statutory jurisdiction to review remand orders, however, did not last long.

C. The Purpose Of The First Bar On Appellate Review Of Remand Orders Differed From The Rationale For Section 1447(d)'s General Rule.

1. The flood of cases filed in—and removed to—federal court soon overwhelmed the judiciary. So Congress restricted federal-removal jurisdiction in 1887. This contraction of federal-removal jurisdiction used different tactics for different levels of the judiciary. First, the 1887 Act provided that only defendants could remove "any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States." Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553.

This affected federal-removal jurisdiction in two ways. The statute's plain language prohibited plaintiffs from removing cases to federal court, which the Judiciary Act of 1875 permitted. Relatedly, the Court interpreted this provision as forbidding removals when the only basis for removal was a

federal-law defense. *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 462 (1894).

The 1887 Act also marked the first time that Congress restricted appellate review of remand orders. Under the statute, when a circuit court determined "that the cause was improperly removed" it had to "remand[]" the case "to the State court from whence it came" and "no appeal or writ of error from the decision of the circuit court so remanding such case [was] allowed." Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. at 553.

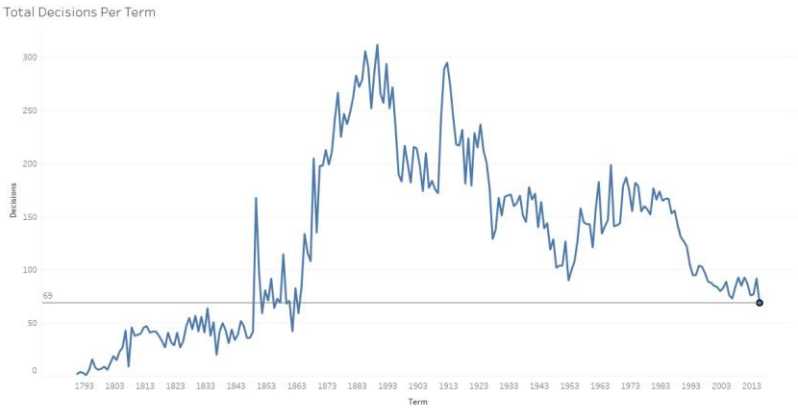
Unsurprisingly, the Court had to decide whether parties could use the pre-1875 practice of petitioning for a writ of mandamus after a remand order. The answer was resounding: No. *See Ex parte Pennsylvania Co.*, 137 U.S. 451, 454 (1890) (Congress intended "to make" remand orders "final and conclusive. * * * The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court").

This restriction on appellate review of remand orders, however, must be seen in context. In 1887, there were no courts of appeals reviewing decisions of the lower federal courts. *Cf.* Evarts Act, ch. 517, § 2, 26 Stat. 826, 826-27 (1891) (creating courts of appeals). Rather, the Supreme Court heard all appeals from circuit courts. Judiciary Act of 1789, ch. 20, §§ 13, 22, 1 Stat. at 81, 84. Although this may have been manageable in our country's early days, 100 years later the growth of America meant that the

Supreme Court was overrun with appeals in both criminal and civil cases.

Given this flood of cases, "[e]very one agreed that the labors of the Justices must be lightened." Frankfurter & Landis, 39 Harv. L. Rev. at 49. And this first bar on appellate review of remand orders "provided a 'quick fix' for a serious and difficult problem" of an overworked Supreme Court. Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 Emory L.J. 83, 101 (1994).

The graph below[2] shows the sharp rise in merits cases decided by the Supreme Court during Reconstruction. It also shows how the bar on appeals of remand orders in 1887 and the creation of the courts of appeals in 1891 acted as a pressure valve.



There is thus no doubt about Congress's objective in 1887 or that it achieved that goal. Because the situation today differs in meaningful

[2] Dr. Adam Feldman created the graph, which is available at https://bit.ly/3prmxGT.

ways, this Court should broadly interpret the exception to Section 1447(d)'s general bar on appellate review of remand orders.

2. Congress soon overhauled the entire federal judiciary. *See generally* Judicial Code of 1911, ch. 231, 36 Stat. 1084. This reorganization saw the elimination of the circuit courts and established the current three-level judiciary we know well.

The new legislation retained the Judiciary Act of 1887's bar on appellate review of remand orders. *See* Judicial Code of 1911, ch. 231, § 28, 36 Stat. at 1095 (If a "district court" held "that the cause was improperly removed" it had to "remand[it] to the State court from whence it came" and appellate courts could not hear an "appeal or writ of error from the decision."). Although the Judicial Code of 1911 closely mirrored the Judiciary Act of 1887, parties sought to use the pre-1875 practice of writs of mandamus to obtain appellate review of remand orders. The Court once again rejected this circuitous path to review. *See In re Matthew Addy Steamship & Commerce Corp.*, 256 U.S. 417, 420 (1921).

In 1948, Congress enacted Section 1447. Act of June 25, 1948, ch. 646, 62 Stat. 869, 939. But it forgot to include the bar on appellate review of remand orders. *See id.* Congress fixed that the next year when it added subsection (d) to the statute. Act of May 24, 1949, ch. 139, § 84, 63 Stat. 89, 102.

The purpose of Section 1447(d)'s bar on appellate review of remand orders substantially differs from the reasons that the Judiciary Act of 1887 barred such review. The current bar on appellate

review reflects a deliberate "policy" choice by "Congress" to not "interrupt[ ] the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 238 (2007) (quotation omitted); *Bd. of Cty. Commissioners of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 816 (10th Cir. 2020) (citations omitted).

3. The difference in purpose between the Judiciary Act of 1887 and Section 1447(d) explains why the Court has read Section 1447(d) narrowly: It cuts against Congress's purpose in allowing defendants to remove cases to federal court. This Court should do the same here.

The trend began in *Thermtron Products*. There, the Court read its prior decisions on reviewing remand orders through mandamus actions very narrowly. Although *Matthew Addy Steamship & Commerce* and *Pennsylvania Company* held that the Supreme Court could not review remand orders in mandamus proceedings, the Court read those decisions to apply only when district courts remand cases because they were removed "improvidently and without jurisdiction." *Thermtron Prods.*, 423 U.S. at 343.

After narrowly construing *Addy Steamship & Commerce* and *Pennsylvania Company*, the Court held that the pre-1875 practice of reviewing remand orders in mandamus proceedings was allowed if the district court remanded the case for an improper purpose such as an overcrowded docket. *Thermtron Prods.*, 423 U.S. at 353. But this was just the

beginning of the narrowing construction of Section 1447(d)'s bar to appellate review of remand orders.

Two decades later, the Court re-affirmed that Section "1447(d) must be read *in pari materia* with [Section] 1447(c), so that only remands based on grounds specified in [Section] 1447(c) are immune from review under [Section] 1447(d)." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995) (citation omitted). Yet later that same term, the Court clarified how it could review such orders.

The Court held that a remand order that falls outside the scope of Section 1447(c) is amenable to immediate appellate review. *Quackenbush*, 517 U.S. at 714. This meant that appellate courts could not avoid appellate review by relying on the extraordinary nature of a writ of mandamus. Courts of appeals thus regularly inquire into whether a remand order is an appealable order. *See*, *e.g.*, *Campbell-McCormick, Inc. v. Oliver*, 874 F.3d 390, 396 (4th Cir. 2017).

Because "[f]ew statutes read more clearly than 28 U.S.C. § 1447(d)," *Osborn v. Haley*, 549 U.S. 225, 262 (2007) (Scalia, J., dissenting), that language should be given its plain-text meaning. An atextual interpretation of Section 1447(d) would track the rationale for the similar bar in the Judiciary Act of 1887. But it would not match the purpose of Section 1447(d)—ensuring that appeals of remand orders do not delay merits adjudication.

The Fourth Circuit held—and Respondent concedes—that courts of appeals have jurisdiction to decide whether removal was proper under Section

1442 or 1443. Neither the Fourth Circuit nor Respondent showed that a court of appeals's addressing all the grounds for remand significantly delays adjudication of the appeal. This suggests the only way to advance Congress's purpose is to allow full review of the District Court's remand order here.

D. Congress Has Explicitly Expanded Appellate Review Of Remand Orders.

As described above, the Court has slowly allowed appellate review of remand orders even without congressional enactment. But three times over the past 60 years Congress has explicitly permitted private parties to appeal remand orders. Congress has not, however, further restricted appellate jurisdiction over remand orders.

1. This trend began with the Civil Rights Act of 1964. Fearing that Southern officials could avoid liability for civil rights violations, Congress amended Section 1447(d) so that courts of appeals could review remand orders when removed under Section 1443. Pub. L. No. 88-352, § 901, 78 Stat. 241, 266.

This addition to Section 1447(d) was an important part of the Civil Rights Act of 1964. Representative Kastenmeier explained that cases remanding civil rights suits to state courts needed appellate review. 110 Cong. Rec. 2,770 (1964). Opponents of the Civil Rights Act of 1964 argued that permitting such review would cause delay. But Representative Kastenmeier insisted that allowing defendants to appeal remand orders would not be "dilatory" or "contribute to dilatory tactics." *Id.* In other words, the right to appeal was not "an

extraordinary remedy." *Id.* Rather, it was meant to implement Congress's intent that federal judges review these cases. *See id.*

The upper chamber echoed the importance of appellate review: Senator Kuchel noted that "[s]ome district judges in the South have referred civil rights cases back to unfriendly State courts." 110 Cong. Rec. 6,564. This frustrated Congress's purpose in allowing for removal in those cases. So appellate review—including by the Supreme Court—was necessary.

The Court soon decided a case showing why appellate review was important. When Georgia charged 20 African-Americans after they sought service in a restaurant, they removed the case to federal court. *See Rachel v. Georgia*, 342 F.2d 336, 341 (5th Cir. 1965). A district court *sua sponte* remanded the case to state court. Exercising its renewed jurisdiction to review such orders, the Court held that it had jurisdiction to hear the appeal and that removal was proper. *See generally Georgia v. Rachel*, 384 U.S. 780 (1966). This history shows that Congress expanded the power of appellate courts to review remand orders to further the purpose of remand—ensuring federal judges decide important cases.

Interpreting Section 1447(d) to allow for appellate review of the entire remand order accomplishes both goals. It ensures that cases like these—which are of national importance—are decided by federal judges. It also does not delay merits adjudication because the courts of appeals are reviewing the remand orders.

2. Congress did not give private parties the right to appeal more remand orders until 2005, when Congress passed the Class Action Fairness Act (CAFA). Now courts of appeals may allow appeals from cases removed to federal court under CAFA. 28 U.S.C. § 1453(c)(1).

The purpose underlying CAFA's review provision shares similarities with the Civil Rights Act of 1964. First, Congress wanted to avoid delayed merits adjudication. *See* S. Rep. No. 109-14, 49, *as reprinted in* 2005 U.S.C.C.A.N. 3, 46 (Congress wanted to provide appellate review of remand orders in CAFA cases "without unduly delaying the litigation of class actions").

Second, Congress wanted to provide "the reassurance of fairness and competence that a federal court can supply to an out-of-state defendant facing suit in state court." S. Rep. No. 109-14 at 5, 2005 U.S.C.C.A.N. at 6 (quoting *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182. F.3d 792, 797 (11th Cir. 1999)). Congress believed that the federal courts were "the proper forum" for these lawsuits. *Id.*

Again, Congress thought that the best way to achieve these two goals was to provide for appellate review of remand orders. And the delay caused by an appeal in a CAFA-remand case dwarfs the delay caused when a court of appeals considers more issues in a single appeal. Although a court of appeals must decide CAFA appeals within 60 days, 28 U.S.C. § 1453(b)(2), the clock does not start until the court of appeals grants a petition under Federal Rule of Civil Procedure 23(f). *Morgan v. Gay*, 471 F.3d 469, 472 (3d Cir. 2006). In some circuits, this can take many

months or years. *See Richardson v. Kane*, No. 13-8046 (3d Cir. July 30, 2015) (granting Rule 23(f) petition 828 days after petition was filed). Broadly interpreting Section 1447(d)'s exception to the bar on appellate review thus reflects Congress's intent in passing Section 1453(c)(1).

3. Congress waited only six years to again expand appellate review of remand orders. In 2011, Congress granted the courts of appeals jurisdiction to hear appeals from remand orders when the removal rests on Section 1442. Removal Clarification Act of 2011, Pub. L. No. 112-51, § 2(d), 125 Stat. 545, 546.

The reason for this expansion in appellate review of remand orders matched the two enactments discussed above. Congress again reiterated that federal officers "should not be forced to answer for conduct asserted within their Federal duties in a state forum that invites 'local interests or prejudice' to color outcomes." H.R. Rep. No. 112-17, 3, *as reprinted in* 2011 U.S.C.C.A.N. 420, 422.

Congress concluded that this goal was being frustrated because courts of appeals could not review improperly remanded cases. *See* H.R. Rep. No. 112-17 at 4, 2011 U.S.C.C.A.N. at 423. So every time Congress has allowed private parties to appeal remand orders it has manifest its preference that neutral federal judges decide cases of special federal interest—like this one. And Congress has decided that the best way to solve these problems is to allow for appellate review of remand orders.

Finally, nothing in these recent enactments expanding the scope of appellate review of remand

orders suggests that Congress wants these provisions narrowly interpreted. Rather, the history shows that Congress wants federal courts to decide these cases even if that sometimes includes having appellate review of remand orders.

* * *

From the time the Framers drafted the Constitution in Philadelphia to today, history shows that having federal courts decide important federal questions is the chief aim of Article III. Although the scope of appellate review of remand orders has ebbed and flowed over the years, Congress has conferred statutory jurisdiction over such appeals whenever the courts of appeals can quickly render a decision. The Fourth Circuit therefore erred by not considering all Petitioners' grounds for removal.

CONCLUSION

This Court should reverse the Fourth Circuit's judgment or, in the alternative, vacate and remand for resolution of Petitioners' other arguments for why removal was proper.

Respectfully submitted,

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