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 INDIANA, ALABAMA, ALASKA, GEORGIA, KANSAS, MISSISSIPPI, MISSOURI, NEBRASKA, NORTH DAKOTA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, AND UTAH AS *AMICI 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 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 *AMICI* STATES

The States of Indiana, Alabama, Alaska, Georgia, Kansas, Mississippi, Missouri, Nebraska, North Dakota, South Carolina, South Dakota, Texas, and Utah respectfully submit this brief as *amici curiae* in support of petitioners.

As litigants who often find themselves on either side of motions to remand cases back to state court, *Amici* States have a strong interest in the scope of appellate review of remand orders. *Amici* States file this amicus brief to urge the Court to respect the plain meaning of the statutory text and hold that when a case has been "removed pursuant to" the federal-officer or civil-rights removal statutes, appellate review of "an order remanding" the case encompasses all grounds for removal. 28 U.S.C. § 1447(d). Because the Fourth Circuit's decision below considered only the federal-officer ground for removal, the decision should be reversed.

Here, furthermore, the Fourth Circuit's refusal to consider all grounds for removal caused it to fail to see that removal was in fact warranted. Because one of the plaintiff's common law claims necessarily arises under *federal* common law, the district court had federal-question jurisdiction over this case and should not have remanded it to state court. Accordingly, this Court should reverse the decision below and instruct the district court to retain jurisdiction over the case.

SUMMARY OF THE ARGUMENT

For more than 230 years federal law has in certain circumstances "grant[ed] defendants a right to a federal forum." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 137 (2005). Today, the general removal statute, 28 U.S.C. § 1441, entitles a defendant to remove a case filed in state court if the state-court plaintiff "could have brought it in federal district court originally"—such as when the case is "a civil action 'arising under the Constitution, laws, or treaties of the United States'" under the federal-question statute. *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) (quoting 28 U.S.C. § 1331). Federal law authorizes removal of other cases as well, such as cases brought against federal officers (or private persons "acting under" such officers), 28 U.S.C. § 1442(a)(1), and cases where the defendant is denied the protections of specified federal civil-rights laws, *id.* § 1443.

When a district court concludes a case is *not* removable and should thus be remanded to state court, its decision is generally "not reviewable" on appeal, subject to two important exceptions: Any "order remanding a case . . . removed pursuant to [the federal-officer or civil-rights removal statutes] shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d).

Here, the Mayor and City Council of Baltimore sued a group of multinational oil and gas companies in Maryland state court, seeking to hold them liable

for "extracting, producing, promoting, refining, distributing, and selling fossil fuel products (*i.e.*, coal, oil, and natural gas)." Pet. App. 31a–32a. Baltimore claims this conduct increased "greenhouse gas pollution" and thereby contributed to global climate change—and is thus partly responsible for "a rise in sea level along Maryland's coast, as well as an increase in storms, floods, heatwaves, drought, extreme precipitation, and other conditions." Pet. App. 32a (internal quotation marks and citations omitted). And Baltimore seeks to recover for these various "'climate-change-related injuries'" on the basis of several theories—all of which it says arise under state laws, and one of which is a common law public-nuisance claim. Pet. App. 32a (quoting complaint).

In response, some defendants filed a notice of removal based on several grounds, including, among others, the federal-officer removal statute and the general removal statute. S*ee* Pet. App. 32a–33a. They argued the federal-officer statute justified removal because, in undertaking some of the conduct at issue, they were "acting under," 28 U.S.C. § 1442(a)(1), federal agencies—in particular, the U.S. Navy and the Department of the Interior, *see* Pet. App. 70a. And the defendants invoked the general removal statute based on multiple theories of federal-question jurisdiction, including that Baltimore's public-nuisance claim necessarily arises under federal common law. *See* Pet. App. 33a. The district court rejected each of the grounds for removal, concluding "that the case was not properly removed to federal court" and that

"the case must be remanded . . . pursuant to 28 U.S.C. § 1447(c)." Pet. App. 81a.

On appeal of the district court's remand order, the Fourth Circuit refused to consider all the grounds the defendants raised for removal. Instead, it thought 1447(d) limited appellate review to the district court's application of the federal-officer removal statute, 28 U.S.C. § 1442, concluding that appellate "jurisdiction does not extend to the non-§ 1442 grounds that were considered and rejected by the district court," Pet. App. 6a. The Fourth Circuit thus read 1447(d) to require federal appellate courts to parse among the various grounds for removal rejected in a single remand order: Appellate courts, it concluded, "only have jurisdiction to review those grounds for removal that are specifically enumerated in § 1447(d)." Pet. App. 10a.

The Fourth Circuit's decision should be reversed. Under 1447(d), once an appellate court has jurisdiction to review a remand order, its jurisdiction encompasses *all* grounds for removal. This provision does not limit appellate courts' jurisdiction to particular *grounds* for removal. Rather, it provides that certain remand *orders* are reviewable on appeal—namely, those "remanding a case to the State court from which it was removed pursuant to section 1442 or 1443." 28 U.S.C. § 1447(d). And as this Court has explained in the course of interpreting the similarly worded permissive-interlocutory-appeal statute (28 U.S.C. § 1292(b)), when "appellate jurisdiction applies to the *order* . . . 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).

In short, no one contests that the defendants removed this case "pursuant to section 1442." The Fourth Circuit therefore had appellate jurisdiction to review the remand order, *and* authority to consider *every* basis for reversing it.

What is more, the Fourth Circuit's refusal to consider every ground for removal led it to affirm a remand order that should have been reversed. The general removal statute authorized removal here because Baltimore's public-nuisance claim necessarily arises under federal common law. The Court has long held that federal common law must govern disputes over interstate pollution: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972). And the dispute for which Baltimore's public-nuisance claim seeks judicial resolution pertains not merely to *interstate* air pollution, but to *international* air pollution. Baltimore's public nuisance claim asks courts to craft rules of decision assigning liability for *global* climate change—which not only is among the most complicated and contentious issues confronting policymakers today, but which also affects every State and every citizen in the country. Under this Court's precedents, if courts are going to give common-law answers to the problem of global climate change, they should be *federal* courts articulating and applying *federal* common law.

ARGUMENT

I. Lawful Appeal of a Remand Order Encompasses All Grounds for Removal

Subsection 1447(d) provides that in general an "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) (emphasis added). This provision affords two crucial exceptions, however. "[A]n *order* remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title [the federal-officer and civil-rights removal statutes, respectively] *shall* be reviewable by appeal or otherwise." *Id*. (emphasis added). The meaning of this language is plain. Because 1447(d) specifically uses the term "order," it obliges circuit courts exercising appellate jurisdiction over a remand order to review the *order* itself, not a mere subset of the legal conclusions offered in the opinion accompanying the order; and evaluating the remand order's lawfulness necessarily requires considering *every* ground for removal. Both the statutory text and the Court's precedents compel this conclusion.

1. Congress has authorized federal courts to hear cases removed from state court since the Judiciary Act of 1789 first established the federal-court system. *See* 1 Stat. 73, c. 20, § 12 (authorizing removal of state-court cases against aliens and nonresident defendants as well as state-court cases involving competing land grants issued by different States). And for

nearly as long as federal courts have possessed authority to hear cases removed from state court, litigants have been disputing what constitutes proper grounds for exercising that authority—and have been seeking appellate review of decisions with which they disagree. Until 1875, erstwhile state-court defendants could freely obtain review of remand decisions. *See* Rhonda Wasserman, *Rethinking Remand: Proposed Amendments to the Federal Removal Statute*, 43 Emory L.J. 83, 90 nn.28–29 (1994) (collecting cases). But that year Congress expanded the class of removable cases and authorized review of remand orders by writ of error or appeal to this Court. *See* Act of March 3, 1875, c. 137, §§ 2, 5, 18 Stat. 470–72. Twelve years later, Congress reversed course: It narrowed the scope of removal, authorized remand where removal was improper (on jurisdictional grounds or otherwise), and foreclosed appellate review of remand orders. *See* 14C Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 3721 (Rev. 4th ed.) (citing Act of March 3, 1887, c. 373, 24 Stat. 552); *Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. 336, 347 (1976) ("[N]o appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." (quoting same)).

These provisions authorizing remand orders and prohibiting their appellate review have for the most part endured. The text now codified at subsections 1447(c) and (d) "represent the 1948 recodification" of the 1887 enactments. *Id.* at 349–50 & n.15. And seventy-two years later, 1447(c) continues to authorize remands for "any defect" (including jurisdiction) while

1447(d) continues to deem such remand orders to be generally "not reviewable on appeal or otherwise."

Importantly, however, Congress has twice amended 1447(d) to carve out exceptions from its general bar on appellate review. The Civil Rights Act of 1964 amended 1447(d) to authorize review, "by appeal or otherwise," of any "order remanding a case to the State court from which it was removed pursuant to section 1443," 78 Stat. 266—that is, cases removed under the civil-rights removal statute, which authorizes removal in cases where state law denies the defendant rights secured by federal laws "'providing for specific civil rights stated in terms of racial equality,'" *see Johnson v. Mississippi*, 421 U.S. 213, 219–20 (1975) (quoting *Georgia v. Rachel*, 384 U.S. 780, 792 (1966)). And in 2011 Congress authorized appellate review of remand orders in cases removed pursuant to section 1442—the federal-officer removal statute, which authorizes removal of cases involving federal officers or agencies, as well as private persons acting under such federal officers or agencies. *See* Pub. L. 112-51 (inserting "1442 or" before 1443 in 1447(d)).

Crucially, these two exceptions to the general bar on appealability provide 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 on appeal or otherwise." 28 U.S.C. § 1447(d) (emphasis added). This language specifies (1) *when* an appeal is permissible (when a case is "removed pursuant to section 1442 or 1443") and (2) *what* the subject of such an appeal is (the "order remanding" the case).

The clear consequence is that when a defendant removes a case pursuant to the federal-officer or civil-rights removal statutes, appellate courts have jurisdiction to review the district court's remand *order*, not merely the district court's resolution of a single, isolated ground for removal.

The surrounding statutory framework confirms this straightforward interpretation. The removal process begins when "defendants desiring to remove any civil action from a State court" file "a notice of removal" that contains "a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). "[P]romptly after the filing of such notice of removal," the defendant gives notice to adverse parties and files "a copy of the notice with the clerk of such State court." 28 U.S.C. § 1446(d). Notably, the filing of this removal notice with the state court "*shall effect the removal* and the State court shall proceed no further unless and until the case is remanded"—that is, the case is "removed" as soon as the state-court notice is filed. *Id.* Accordingly, when a removal notice includes several grounds for removal, one of which proceeds under the federal-officer or civil-rights removal statutes, the case "was removed pursuant to section 1442 or 1443" the moment the removal notice was filed. 28 U.S.C. § 1447(d).

Here, because the removal notice raised the federal-officer removal statute as a ground for removal, *see* Joint App. 225–31, the case was "removed pursuant to section 1442," thereby triggering 1447(d)'s appealability exception. It appears this much, at least,

is uncontested. After all, if the defendants' additional, non-federal-officer grounds for removal were to cause the case not to be "removed pursuant to section 1442," 1447(d) would bar appellate review entirely, even of the federal-officer ground alone. And neither Baltimore nor the Fourth Circuit—nor any court for that matter—have taken this position.

It is therefore clear that the district court's remand order is appealable under 1447(d). And it is equally clear that the scope of the appeal encompasses *every* ground for removal: The subject of the appeal is the "*order* remanding [such] a case to the State court from which it was removed." *Id.* (emphasis added). Subsection 1447(d) thus authorizes appeal of the *order*—without limitation.

Accordingly, when a remand order rejecting removal on federal-officer or civil-rights grounds is appealed under 1447(d), the appellate court has jurisdiction to consider *all* grounds raised in favor of removal—including those for which the defendant would not otherwise be able to obtain appellate review. As Judge Easterbrook explained in the course of adopting this interpretation of 1447(d), "[t]o say that a district court's 'order' is reviewable is to allow appellate review of the *whole* order, not just of particular issues or reasons." *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015). For this reason, "if appellate review of an 'order' has been authorized, that means review of the 'order.' Not particular reasons *for* an order, but the order itself." *Id.* at 812 (emphasis in original).

Reading 1447(d) this way not only makes the best sense of the statutory text, but also makes the best use of litigants' and courts' time. After all, "once Congress has authorized appellate review of a remand order"—as it has when the state-court defendant relies on the federal-officer or civil-rights removal statutes—"[t]he marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small." *Lu Junhong*, 792 F.3d at 813. The leading federal-courts treatise agrees: "Review should . . . be extended to all possible grounds for removal underlying the order. Once an appeal is taken there is very little to be gained by limiting review . . . ." 14C Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 3914.11 (Rev. 4th ed.).

2. This "whole order" interpretation of 1447(d) is further supported by the Court's prior decisions. In *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), the Court construed the permissive-interlocutory-appeal statute, which, like 1447(d), authorizes appeals of a particular class of *orders*. That statute provides that when a district court determines that an "'*order* 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,'" a circuit court has discretion to "'permit an appeal to be taken *from such order*.'" *Id.* at 204–05 (quoting 28 U.S.C. § 1292(b) (emphasis in original)). The Court underscored the importance of Congress's choice of the word "order," observing 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." *Id.* at 205 (emphasis in original). It thus held that an appellate court "may address any issue fairly included within the certified order because it is the *order* that is appealable, and not the controlling question identified by the district court." *Id.* (emphasis in original; internal quotation marks and citations omitted). That is, when an order is appealed under 1292(b), the "scope of review [includes] all issues material to the order in question." *Id.* (alteration in original; internal quotation marks and citations omitted). Subsection 1447(d) provides no textual (or historical) basis for differing treatment of an "order" appealed under its authority.

In fact, the Court's decision in *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224 (2007), confirms that in 1447(d) "order" means *order*—not "issue." There, the Ninth Circuit purported to divide a single remand order into two sorts of issues—the nonreviewable question of removal jurisdiction and a reviewable set of "merits determinations that precede remand." *Id.* at 235–36. This Court squarely rejected that approach and said that, insofar as 1447(d) generally bars appeal of an "order remanding a case to the State court from which it was removed" (*i.e.*, where no exception applies), it precludes review of every discrete issue within that order. 28 U.S.C. § 1447(d). Even if antecedent "merits determinations" could have avoided the 1447(d) appeal bar if they had been the subject of a *separate* order, a singular remand order must be treated as a whole: The statute

"does not permit an appeal" of any stand-alone issues "when there is no *order* separate from the unreviewable remand order." *Id.* at 236 (emphasis in original) (citing *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 645–46 n.13 (2006)).

Subsection 1447(d)'s identically worded *exception* for any "order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443" should be read the same way. Just as the general prohibition of appealability applies to the whole order, so the authorization of appealability applies to the whole order. 28 U.S.C. § 1447(d). "To give these same words a different meaning . . . would be to invent a statute rather than interpret one. . . . [A single phrase] cannot . . . be interpreted to do both [things] at the same time." *Clark v. Martinez*, 543 U.S. 371, 378 (2005). The Court should refuse, as it has many times before, "to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329 (2000) (citing *Bankamerica Corp. v. United States*, 462 U.S. 122, 129 (1983)).

In sum, the Court's decisions establish that 1447(d) does not permit appellate courts to slice and dice the often-numerous legal issues that may underlie a remand order. A remand order is either appealable or not. If it is, the *entire* order is reviewable on appeal.

3. Rather than accept that 1447(d) authorizes appeals of *orders*, the Fourth Circuit's decision mistakenly limited the scope of appellate review to only *reasons* for removal resting on the federal-officer or civil-rights removal statutes. Pet. App. 7a. The Fourth Circuit based this conclusion upon its earlier decision in *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976), and *that* decision's discussion of the issue consists entirely of a citation to the Sixth Circuit's half-century-old decision in *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 533 (6th Cir. 1970).

And far from supporting the Fourth Circuit's reading of 1447(d), *Appalachian Volunteers*——which the Sixth Circuit has since implicitly repudiated, *see Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017) (citing *Lu Junhong*, 792 F.3d at 811–13)—illustrates precisely why it is wrong. *Appalachian Volunteers*—which appears to be the first published decision to address the question, and the origin of this mistaken view—reached its result by prioritizing purpose over text. It assumed that 1447(d)'s "obvious purpose . . . is to avoid the delays which would result if appeals from remand orders were permitted," and reasoned that "even when removal is based on 28 U.S.C. § 1443 and an appeal is authorized, the review of issues other than those directly related to the propriety of the remand order itself would frustrate the clear Congressional policy of expedition." 432 F.2d at 533.

This Court, however, "has long rejected the notion that 'whatever furthers the statute's primary objective must be the law.'" *Cyan, Inc. v. Beaver Cty. Emp.*

Ret. Fund, 138 S. Ct. 1061, 1073 (2018) (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam)). After all, courts "do not generally expect statutes to fulfill 100% of all of their goals." *Id.* Indeed, 1447(d)'s federal-officer and civil-rights exceptions to the general appealability bar are themselves examples of Congress choosing to set aside one goal (preventing prolonged disputes over where a case will be litigated) for the sake of another (protecting defendants' right to a federal forum). It was entirely sensible for Congress to decide that some remand orders should be appealable and that the scope of review of such orders should include all grounds for removal: As noted, "[t]he marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small." *Lu Junhong*, 792 F.3d at 813.

"Where, as here, the language of a provision is sufficiently clear in its context and not at odds with the legislative history, there is no occasion to examine the additional considerations of policy that may have influenced the lawmakers in their formulation of the statute." *Rodriguez*, 480 U.S. at 526 (internal alterations, quotation marks, and citations omitted). Here the statute says that because the case "was removed pursuant to section 1442," the "order remanding the case . . . shall be reviewable"—period. 28 U.S.C. § 1447(d). The statute does not impose any limitations on the scope of appellate review, and "supposition of what Congress *really* wanted" is no reason for courts to do so in its stead. *Powerex*, 551 U.S. at 237. The statute is clear. It should be enforced as written.

II. Removal Was Proper Because Baltimore's Public-Nuisance Claim Necessarily Arises Under Federal Law

The Fourth Circuit's misinterpretation of 1447(d) did not just affect its analysis of the remand order; it affected its ultimate judgment as well. Because it considered only whether the federal-officer removal statute provided grounds for removal, the Fourth Circuit missed a ground for removal that should have caused it to reverse the district court's remand: Baltimore's public-nuisance claim necessarily arises under federal common law, which means the federal-question statute conferred jurisdiction and that the defendants were therefore entitled to removal.

A. Federal common law must govern any common-law claims to abate the results of global climate change

1. In *Erie Railroad Co. v. Tompkins* the Court recognized that federal courts have no power to supplant state common law with "federal *general* common law," 304 U.S. 64, 78 (1938) (emphasis added). The Court soon made it clear, however, that this principle does not prevent *specialized* federal common law from exclusively governing areas implicating unique federal interests. In "an opinion handed down the same day as Erie and by the same author, Mr. Justice Brandeis, the Court declared, 'For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' . . . .'" *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398,

426–27 (1964) (quoting *Hinderlider v. La Plata River Co.*, 304 U.S. 92, 110 (1938)); *see also Hinderlider*, 304 U.S. at 110 ("Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions.").

And less than five years after *Erie*, the Court issued its seminal decision in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), holding that federal common law should determine whether the United States could obtain reimbursement for a stolen check it had issued and that a bank had cashed over a forged endorsement. *Id.* at 364–66. The district court applied state law and concluded that the United States had unreasonably delayed giving notice of the forgery and was therefore barred from recovery, but this Court held that *federal*, not state, law governed: "The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law," because "[t]he authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state." *Id.* at 366.

In the nearly eighty years since *Clearfield*, the Court has held that federal common law necessarily and exclusively governs disputes in numerous other areas as well. *See, e.g., United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979) (holding that "the priority of liens stemming from federal lending

programs must be determined with reference to federal law"); *Banco Nacional,* 376 U.S. at 425–427 (holding, in light of "the potential dangers were Erie extended to legal problems affecting international relations," that "the scope of the act of state doctrine must be determined according to federal law").

In *United States v. Standard Oil Co.*, for example, the Court held that federal common law applied to the federal government's claims against an oil company whose driver had struck and injured an American soldier. 332 U.S. 301, 302 (1947). The Court observed that *Erie* did not alter the longstanding rule that federal law—including federal common law—must apply to "matters exclusively federal, because made so by constitutional or valid congressional command, or others so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings." *Id.* at 307. Rather, "federal judicial powers . . . remained unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question." *Id.* In light of the federal government's "exclusive power to establish and define the [military] relationship" and the fact that "the Government's purse is affected," the Court held that "[a]s in the Clearfield case, . . . the matter in issue is neither primarily one of state interest nor exclusively for determination by state law within the spirit and purpose of the Erie decision." *Id.* at 306–07.

More recently, in *Boyle v. United Technologies Corp.*, the Court held that federal common law governs design-defect claims brought against manufacturers of military equipment. 487 U.S. 500, 512 (1988). The Court explained that "procurement of equipment by the United States" is "an area of uniquely federal interest" and that in this context "the application of state law would frustrate specific objectives of federal legislation." *Id.* at 507 (internal alterations, quotation marks, and citations omitted). In particular, the Court emphasized the practical problems with inevitably conflicting state laws in this area: "[P]ermitting second-guessing" of the federal government's military-equipment-design decisions "through state tort suits against contractors would produce the same effect sought to be avoided by" the Federal Tort Claims Act. *Id.* at 511. "The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs." *Id.* at 512. Because of the unique federal concerns pertaining to military procurement and the potential for significant conflicts with federal policy, *federal* common law, not state common law, governed the claim.

In sum, the "clarion yet careful pronouncement in *Erie*, 'There is no federal general common law,' opened the door for what, for want of a better term, we may call specialized federal common law." Henry J. Friendly, *In Praise of Erie - and of the New Federal*

Common Law, 39 N.Y.U. L. Rev. 383, 405 (1964). And it is by now well established that this specialized common law applies to the "few areas, involving 'uniquely federal interests,'" that "are so committed by the Constitution and laws of the United States to federal control" that they must be "governed exclusively by federal law." *Boyle*, 487 U.S. at 506 (quoting *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

2. Of particular relevance here, for nearly half a century the Court has held that one area of "uniquely federal interest" to which federal common law must apply is *interstate pollution*: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Illinois v. City of Milwaukee, Wis.,* 406 U.S. 91, 103 (1972). And for this reason, federal common law necessarily applies to Baltimore's public-nuisance claim—which alleges that the defendants' production and promotion of fossil fuels caused interstate pollution (in the form of greenhouse gases emitted by countless entities worldwide) that contributed to global climate change, which in turn caused the injuries for which Baltimore seeks abatement. *See* Joint App. 145–146. If the complex and controversial policy questions underlying such a claim are going to be resolved by courts at all, they should be *federal* courts applying *federal* common law.

The Court held that federal common law governed the interstate-pollution dispute in *Illinois*, and federal common law is all the more applicable here. As

here, *Illinois* involved a suit brought to abate interstate pollution that the plaintiff claimed constituted a public nuisance. Invoking the Court's original jurisdiction, Illinois claimed that several Wisconsin cities had polluted Lake Michigan with raw or inadequately treated sewage: "The cause of action alleged is pollution by the defendants of Lake Michigan, a body of interstate water," and Illinois asked the Court to "abate this public nuisance." *Illinois*, 406 U.S. at 93. The Court recognized that because Illinois had sued an out-of-state entity the case fell within its original jurisdiction, but it observed that if the case could have instead been brought "in a federal district court, our original jurisdiction is not mandatory." *Id.* at 98. The Court thus proceeded to consider "whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of s 1331(a) [the federal-question statute]." *Id.* at 99.

The Court held "that it does." *Id.* It explained that an earlier Tenth Circuit decision had "stated the controlling principle"—"'the ecological rights of a State in the improper impairment of them from sources outside the State's own territory. . . [is] a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States.'" *Id.* at 99–100 (quoting *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971)). Further, the Court analogized interstate-pollution disputes to disputes "concerning interstate waters," which *Hinderlider* more than three decades prior had "'recognized as presenting federal questions.'" *Id.* at 105 (quoting

Hinderlider, 304 U.S. at 110). *Hinderlider*—which "was written by Mr. Justice Brandeis who also wrote for the Court in *Erie*, the two cases being decided the same day"—foreclosed the argument "that state law governs" interstate-pollution disputes; it established that *federal* common law such disputes instead. *Id.* at 105 n.7 (internal citations omitted). In sum, "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, [the Court has] fashioned federal common law." *Id.* at 105 n. 6 (citing *Banco Nacional*, 376 U.S. 398).

In *American Electric Power Co. v. Connecticut*, the Court reiterated *Illinois*'s conclusion that "'[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." 564 U.S. 410, 421 (2011) (quoting *Illinois*, 406 U.S. at 103). Justice Ginsburg's opinion for the Court reaffirmed precisely the Court's reasoning in *Illinois*: Specialized federal common law governs "'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands." *Id.* (quoting Friendly, *supra,* at 408 n. 119, 421–422). And because the "national legislative power" includes the power to adopt "environmental protection" laws addressing interstate pollution, federal courts can, "if necessary, even 'fashion federal law'" in this area. *Id.* (quoting Friendly, *supra,* at 421–422).

Illinois held that claims to abate public nuisance in interstate waters arise under federal common law,

and it expressly extended this conclusion to the parallel situation of disputes involving "air . . . in their ambient or interstate aspects" as well. *Illinois*, 406 U.S. at 103. That definitively establishes that federal—not state—common law applies to Baltimore's claim to abate public nuisance in interstate *air*. What is more, the reasons the Court cited for applying federal common law in *Illinois* apply with even greater force here, where Baltimore seeks to bring a purportedly Maryland-law claim against energy companies for injuries allegedly produced by a long chain of conduct—including conduct of third parties—that occurred all over the globe.

3. Indeed, this case powerfully illustrates why the Court has held that, in areas of unique federal interests, any common-law rules of decision must be articulated by federal—not state—courts.

Baltimore urges Maryland state courts to determine—under the auspices of the common law of public nuisance—whether "the harm [of fossil fuels] outweighs any offsetting benefit," Joint App. 156, including whether "the social benefit of placing fossil fuels into the stream of commerce is outweighed by the availability of other sources of energy," Joint App. 159. That is, it asks Maryland courts to weigh the costs and benefits of fossil fuels and then decide how to regulate them—quintessentially legislative judgments.

Exacerbating the problem, Baltimore has sued just a handful of energy companies for conduct that

occurred not only outside Maryland, but outside the country—conduct Baltimore concedes to be injurious only in conjunction with others' *use* of the fossil fuels the defendants (and others) produce and sell. In other words, Baltimore is seeking, from a few disfavored companies, abatement of *all* the harm it has allegedly suffered from global climate change, even though many other actors, through conduct occurring in many other States and countries, are—on Baltimore's own account—responsible for much of that alleged harm. *See* Joint App. 145-146, 160-161.

State courts have no business deciding how global climate change should be addressed and who—among all the countless actors around the world whose conduct contributes to it—bears legal responsibility for creating it. In addition to the obvious potential for gross unfairness, such state-court-created common-law rules would inevitably "present a 'significant conflict' with federal policy." *Boyle*, 487 U.S. at 512. Among many other problems, state-common-law rules would undermine the regulatory authority States themselves have under carefully calibrated cooperative-federalism programs—programs that are administered by politically accountable officials at the federal, state, and local levels.

The Clean Air Act, 42 U.S.C. § 7401 *et seq.*, for example, assigns States a significant role in tailoring and enforcing the statute's requirements, with state officials, subject to review by federal officials, holding authority to craft state-specific solutions to the difficult questions surrounding air-pollution regulation.

See, e.g., *id.* § 7401(a)(3) (finding that controlling air pollution "at its source is the primary responsibility of States and local governments"); *id.* § 7410(a) (requiring States to adopt implementation plans to achieve federal ambient air quality standards and permitting variation in light of local circumstances); *id.* § 7412(*l*) (authorizing States to implement federal hazardous air pollutant standards and allowing modifications to meet local needs); *id.* § 7416 (authorizing States to impose state-law requirements more stringent than federal standards); *id.* § 7661a (requiring States to adopt permitting programs tailored to state needs).

Congress identified the Clean Air Act's purpose as promoting *both* the country's "public health and welfare *and* the productive capacity of its population." 42 U.S.C. § 7401(b)(1) (emphasis added). And it has endorsed different regulatory approaches in different States because it recognizes that pursuing both of these goals—balancing health and environmental considerations against the value of economic activity, including energy production—is an inherently political undertaking that must be responsive to local conditions. And, critically, each State is afforded regulatory autonomy because *other* States' policy prerogatives stop at the state line. Baltimore's lawsuit, in stark contrast, would purport to impose a single, state-court-created, one-size-fits-all policy.

Making matters still worse, Baltimore is not alone in urging its state courts to impose judicially created regulations on the worldwide production of fossil

fuels. Many other jurisdictions have filed similar public-nuisance claims urging state courts to hold fossil fuel companies liable for the costs of global climate change. *See* Pet. Br. 6–7 & n.1. Chances are that courts in at least some of these actions will be receptive to the claims, which will ultimately lead to a patchwork of conflicting standards purporting to create liability for the same extraterritorial conduct. Ultimately, therefore, all this and other similar lawsuits have to offer is regulatory chaos.

Any worldwide allocation of responsibility for remediation of climate change requires national or international action, not ad hoc intervention by individual state courts acting at the behest of a handful of local governments. It is precisely for this reason that the Court long ago held that if questions of interstate pollution are going to be settled by courts, they should be federal courts applying federal common law. *See Illinois*, 406 U.S. at 103.

B. Because Baltimore's public-nuisance claim is governed by federal common law, the claim arises under federal law and removal was therefore proper

That federal common law governs Baltimore's public-nuisance claim necessarily means this case is removable to federal court. The federal-question statute gives district courts jurisdiction to hear claims sounding in federal common law; Baltimore thus "could have brought [this case] in federal district

court originally" and the defendants were thus "entitled to remove" the case. *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). The Fourth Circuit should therefore have reversed the district court's remand order.

1. The federal-question statute gives federal district courts "original jurisdiction" over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a). And it is well-settled that a "case 'arising under' federal common law presents a federal question and as such is within the original subject matter jurisdiction of the federal courts." 19 Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 4514 (3d ed.).

The Court has recognized on multiple occasions "'the statutory word 'law' includes court decisions'", and "embrace[s] claims founded on federal common law." *Illinois*, 406 U.S. at 99 (quoting *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 393 (opinion of Brennan, J.)); *see also id.* (acknowledging that lower courts have reached this same conclusion); *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 882 (D. Ariz. 2003), *aff'd*, 417 F.3d 1091 (9th Cir. 2005) ("Jurisdiction exists over violations to the federal common law as well as those of statutory origin, and, therefore, this Court has subject matter jurisdiction over Plaintiffs' common law nuisance claim."). As here, in *Illinois* the Court determined that a claim seeking abatement of interstate pollution "creates an action that arises under the 'laws' of the

United Sates within the meaning of 1331(a)." 406 U.S. at 99.

Accordingly, because Baltimore's public-nuisance claim necessarily sounds in federal common law, the district court had jurisdiction over this case and its remand motion should have been reversed.

2. Crucially, the district court had jurisdiction over this case because Baltimore's claim *necessarily arises* under federal common law—not merely subject to a federal-law defense. And that means Baltimore cannot deprive federal courts of jurisdiction simply by affixing a state-law label to its public-nuisance claim.

Generally, of course, a plaintiff is "the master of the claim" and "may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Yet, "[a]llied as an 'independent corollary'" to the well-pleaded complaint rule "is the further principle that 'a plaintiff may not defeat removal by omitting to plead necessary federal questions.'" *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998) (quoting *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 22 (1983)). Plaintiffs cannot evade the reach of federal law or federal courts by declaring unilaterally that their claims arise under state law. "If a court concludes that a plaintiff has 'artfully pleaded' claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint." *Id.* In other words, when

a plaintiff raises a nominal state-law claim that *is in fact* governed by federal law, removal is proper.

Such was the foundation, for example, of the Court's holding in *Avco Corp. v. Aero Lodge No. 735*, which held that an action to enforce a provision of a collective bargaining agreement was "controlled by federal substantive law even though it is brought in a state court" —and was therefore removable to federal court—because the case necessarily stated a claim "arising under the 'laws of the United States' within the meaning of the removal statute." 390 U.S. 557, 560 (1968) (quoting 28 U.S.C. § 1441(b)). Lower courts, too, have applied this reasoning to uphold removal of cases raising purportedly state-common-law claims that are in truth governed by federal common law. *See New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 955 (9th Cir. 1996) (declaring that federal, rather than state, common law provides the rule of decision—and a basis for federal question jurisdiction—to a dispute over a federal defense contract); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926–28 (5th Cir. 1997) (citing *Illinois* and holding that, notwithstanding plaintiff's nominal plea of a state law claim, federal common law applied to—and conferred federal-question jurisdiction over—an air-transit lost-cargo claim because Congress preserved a "federal common law cause of action against air carriers for lost shipments").

Indeed, allowing artful pleading to avert removal of claims necessarily governed by federal common law would put *state* courts in the position of creating *federal* common-law. And that would undermine the very purpose of federal common law, which is to ensure that in "a few areas, involving uniquely federal interests," the rules of decision "are governed exclusively by federal law." *Boyle*, 487 U.S. at 504 (internal quotation marks and citations omitted). Where, as here, the rules of decision "must be determined according to federal law," "state courts [are] not left free to develop their own doctrines." *Banco Nacional*, 376 U.S. at 426–27.

In contrast with disputes over the meaning of federal statutory or constitutional provisions, common-law cases require courts to make difficult judgments about what "seems to [them] sound policy," *Boyle*, 487 U.S. at 513, which is why state-court common law decisions are usually understood to announce (and perhaps inherently do announce) *state* common law. Permitting plaintiffs to compel state-court adjudication of federal-common-law claims, therefore, would put state courts in the position of discerning federal judicial policy—or else guess what policy judgments regarding "uniquely federal interests" *this* Court would adopt. The Court's decisions, however, hold that in certain areas, such as those involving interstate pollution, any common-law rules must be crafted by *federal* judges—that is, judges appointed by a nationally elected president and confirmed by a Senate in which every State is entitled to equal representation.

It is therefore essential to permit removal of claims that, while pleaded in state law terms, in fact sound in federal common law. And here, Baltimore's common-law public-nuisance claim must be governed by *federal* common-law rules of decision articulated by *federal* courts. The district court had jurisdiction to consider this claim, and the defendants were therefore entitled to removal.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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