No. 19-1189

IN THE
Supreme Court of the United States

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

v.

MAYOR & CITY COUNCIL OF BALTIMORE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT MAYOR & CITY COUNCIL OF BALTIMORE

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QUESTION PRESENTED

Whether 28 U.S.C. 1447(d) entitles a defendant, by including a meritless federal-officer or civil-rights ground for federal jurisdiction in a removal petition, to appellate review of every ground for removal rejected by the district court's remand order.

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INTRODUCTION

The Fourth Circuit correctly concluded that 28 U.S.C. 1447(d) does *not* authorize appellate courts to review every otherwise unreviewable ground for removal rejected by a district court, just because a defendant has included a meritless claim for federal-officer or civil-rights jurisdiction as one ground for removal. This Court has never declared that appellate review of a district court order necessarily entails review of all issues addressed in the order. And it has not hesitated to limit appellate review to particular issues where doing so is consistent with the text, context, history, and purpose of the statute granting such review.

All tools of statutory interpretation point in the same direction here: Section 1447(d) authorizes review of a remand order only insofar as it addresses federal-officer and civil-rights removal. This construction gives due regard to the statute's textual focus on Sections 1442 and 1443; is consistent with courts' interpretation of identical language in Section 1447(c); respects the federalism-based principle that statutes conferring federal jurisdiction should be narrowly construed; and furthers the strong congressional policy against prolonged litigation on non-merits issues.

Respondent prevails for another, independent reason: this case was not removed "pursuant to" Section 1442 or 1443. In this context, "pursuant to" means "in compliance with," "in conformance to," or "in accordance with," and therefore a case is removed "pursuant to" Section 1442 or 1443 only if it satisfies the removal requirements of either provision. Section 1447(d) is one of many statutes that entwine jurisdiction and merits. Once an appellate court determines that a defendant's claims to federal-officer or civil-rights jurisdiction lack merit, its inquiry ends.

The history of Section 1447(d) in Congress and the Courts confirms that the scope of appellate review under its exception clause is limited to Section 1442 and 1443 grounds for removal. Between 1964, when Congress created the civil-rights exception to the provision's appellate bar, and 2011, the nine circuits to consider this question all held that their review was limited to the civil-rights removal ground. When Congress amended Section 1447(d) as part of the Removal Clarification Act of 2011 to add the federal-officer exception, it ratified five decades of appellate authority construing the scope of review as limited to the enumerated removal grounds.

The Court should affirm the judgment below.

STATEMENT

1. For more than 130 years, Congress has prohibited nearly all appellate review of district court remand orders. The Judiciary Act of 1887 made such orders unreviewable and required their "immediate[]" execution upon issuance. Act of March 3, 1887, § 2, 24 Stat. 552, 553; see *Ex parte Pennsylvania Co.*, 137 U.S. 451, 454 (1890); *United States v. Rice*, 327 U.S. 742, 752 (1946). In 1949, one year after codifying Title 28 of the United States Code (which omitted that longstanding prohibition, apparently inadvertently), Congress enacted 28 U.S.C. 1447(d): "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." Act of May 24, 1949, ch. 139, § 84, 63 Stat. 89, 102.

That statutory bar on appellate jurisdiction remained absolute until the Civil Rights Act of 1964, which carved out a narrow exception for remand orders in cases removed pursuant to Section 1443,

the civil-rights removal statute, "to give the federal reviewing courts a new opportunity to consider the meaning and scope of [that] removal statute." *Georgia v. Rachel*, 384 U.S. 780, 786–87 & n.7 (1966). That narrow exception remained unchanged for more than 50 years. Every circuit to consider the issue concluded that the exception to Section 1447(d) authorized review of the civil-rights ground for removal only. In 2011, Congress amended Section 1447(d) again, adding just two words, "1442 or," without modifying the language or statutory structure courts had relied upon in construing the scope of appellate review authorized by Section 1447(d). See Removal Clarification Act of 2011, Pub. L. 112-51, § 2(d), Nov. 9, 2011, 125 Stat. 546.

2. Respondent, the Mayor and City Council of Baltimore, brought this action in Maryland state court, alleging exclusively state-law causes of action (including public and private nuisance and failure to warn) based on petitioners' decades-long campaigns to promote fossil-fuel products while wrongfully concealing the destructive impacts on public infrastructure they knew would result from using those products as directed. J.A. 23, 26–29, 87–131, 155–182. As the Fourth Circuit noted, respondent's complaint "seeks to challenge the promotion and sale of fossil fuel products without warning and abetted by a sophisticated disinformation campaign." Pet. App. 21a. Respondent does "not seek to impose liability on Defendants for their direct emissions of greenhouse gases [or] to restrain Defendants from engaging in their business operations." J.A. 29.

Petitioners removed on eight separate grounds. J.A. 187–242. The district court rejected all eight, Pet. App. 31a–81a, including petitioners' "attenuated"

theory of federal-officer jurisdiction, *id.* 70a–71a, and remanded the case to state court. The Fourth Circuit affirmed the remand order, concluding that petitioners' allegations did not support federal-officer removal jurisdiction and that Section 1447(d) limited its review to that issue only. *Id.* 2a, 6a–30a.

SUMMARY OF ARGUMENT

Section 1447(d)'s first clause (the Non-Reviewability Clause) strips appellate courts of jurisdiction to entertain appeals from remand orders. Its second clause (the Exception Clause), enacted in 1964 and amended in 2011, contains a limited exception for "an order remanding a case . . . removed pursuant to section 1442 or 1443 . . . ." The language of the Exception Clause, by its terms and in the context of the statute as a whole, limits appellate review to its expressly enumerated grounds for removal. Between 1964 and 2015, nine circuits unanimously and correctly construed the provision that way.

I. The text, context, and structure of Section 1447(d) limit appellate review of removal grounds to those enumerated in the Exception Clause.

A. Petitioners focus on the word "order" in isolation, Pet. Br. 12, but courts read statutes as "a whole." *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010). So read, the Exception Clause makes a remand order reviewable only insofar as the order addresses Section 1442 and 1443 removal grounds.

Although this Court has construed some statutes as authorizing plenary review of lower court decisions, see *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), it has never said that appellate review of a lower court ruling necessarily means review of all issues raised therein. The Court has often interpreted

appellate jurisdiction statutes as limiting review to particular issues in an order, judgment, or decision. For example, the Court reviews state-court judgments under 28 U.S.C. 1257 only to the extent they rest on dispositive questions of federal law. See *Murdock v. City of Memphis*, 87 U.S. 590, 607–08, 627, 630–32 (1874); *Fuller v. Oregon*, 417 U.S. 40, 48 n.9 (1974). It reviews collateral orders under 28 U.S.C. 1291 only insofar as they address questions "collateral to, and separable from the principal issue" in the case. See *Abney v. United States*, 431 U.S. 651, 659, 662–63 (1977); *Behrens v. Pelletier*, 516 U.S. 299, 312–13 (1996). And for more than 60 years, it reviewed certain "decision[s] or judgment[s]" under the Criminal Appeals Act, 34 Stat. 1246, only as to certain statutory challenges expressly described in the Act. See *United States v. Borden Co.*, 308 U.S. 188, 192–93 (1939); *United States v. Keitel*, 211 U.S. 370, 397–99 (1908).

The Exception Clause similarly authorizes review only of its two enumerated removal grounds. Substantial textual evidence confirms this conclusion. When Congress carved out exceptions to Section 1447(d)'s blanket prohibition against reviewability, it tethered review to federal-officer and civil-rights jurisdiction, which are the "basic focus" of the Exception Clause. *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 387 (2014). Under petitioners' construction, however, a reviewing court need not even consider Section 1442 or 1443 if another, otherwise unreviewable ground supports removal. See Pet. Br. 31.

The Exception Clause's limited scope of review is also consistent with courts' interpretation of Section 1447(c), which provides that an "order remanding the case may require" the removing defendant to pay the plaintiff's fees and costs in seeking remand. 28 U.S.C.

1447(c). Eleven circuits agree that the fee portion of a remand order is reviewable, even when the remand decision is not. See also *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Under petitioners' "entire order" construction, though, an award or denial of fees would be appealable if and only if Section 1442 or 1443 were among the defendant's asserted grounds for removal—an anomalous result.

Structural features of Section 1447(d) also support reading the Exception Clause as authorizing review only of its enumerated removal grounds. As an exception to the general rule of non-reviewability, the Exception Clause must be construed narrowly to preserve the primary operation of the Non-Reviewability Clause. See *Comm'r v. Clark*, 489 U.S. 726, 739 (1989). A narrow construction also supports "[o]ur system of 'cooperative judicial federalism,'" *McKesson v. Doe*, No. 19-1108, slip op. at 4 (U.S. Nov. 2, 2020), which presumes that state courts are competent and unbiased and which requires a strict construction of removal statutes, see *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997). Petitioners' construction turns these structural considerations on their head, mandating appellate review of jurisdictional determinations that Congress has declared unreviewable since 1887.

B. Respondent should also prevail for an independent reason: Even if petitioners' interpretation of "order" as allowing appellate review of all issues in the order were otherwise correct, Section 1447(d) by its terms limits appellate jurisdiction to cases removed "pursuant to section 1442 or 1443." Where, as here, the defendants' asserted grounds for removal under Section 1442 or 1443 lack merit, the removal is not "pursuant to" those grounds, and the appellate court's jurisdiction ends.

The ordinary meaning of "pursuant to" is "in accordance with," "in conformance to," or "in compliance with." The Exception Clause therefore grants appellate jurisdiction to review a remand order only in cases that accord, conform, or comply with the requirements of either of the two designated removal provisions. That common-sense conclusion is supported by this Court's interpretation of "pursuant to" and similar language in other statutes and in the Constitution. See, *e.g.*, *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355–56 (2018); *Alden v. Maine*, 527 U.S. 706, 731 (1999); *Pereira v. Sessions*, 138 S. Ct. 2105, 2117 (2018).

Thus, where a defendant asserts multiple grounds for removal, the court of appeals must first determine whether the purported removal under Section 1442 or 1443 was proper. If it was not, the Non-Reviewability Clause bars review and the court can go no further. Section 1447(d) is thus consistent with other jurisdictional statutes that require courts to address the merits of an issue or claim in determining their own jurisdiction. See, *e.g.*, *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017); *United States v. Ruiz*, 536 U.S. 622, 626–28 (2002). Had Congress intended to grant appellate jurisdiction to review remand orders whenever a defendant merely alleges Section 1442 or 1443 removal grounds, it could have said so, as it has often done. See, *e.g.*, 15 U.S.C. 78aa; 42 U.S.C. 2297h-8(a)(7)(C); 28 U.S.C. 1338(b); 28 U.S.C. 1354; 25 U.S.C. 3013; 44 U.S.C. 2204(e).

II. The history of Section 1447(d) confirms that the Exception Clause limits review to its enumerated removal grounds. From 1964 until 2015, appellate

courts unanimously interpreted Section 1447(d) as "permitting review of only the grounds for removal identified in the exception clause." *Cty. of San Mateo v. Chevron Corp.*, 960 F.3d 586, 597 (9th Cir. 2020). When Congress amended Section 1447(d) as part of the Removal Clarification Act of 2011, it ratified that settled interpretation by "perpetuating the wording" of the provision. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 536 (2015); see also *Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978).

III. Limiting appellate review to the two specific grounds identified by Congress in the Exception Clause also advances Section 1447(d)'s purposes.

Petitioners' interpretation of Section 1447(d) would undermine Congress's policy of "avoiding prolonged litigation" of non-dispositive jurisdictional issues. *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 237 (2007). As this case shows, the burdens of adjudicating additional remand grounds on appeal are far from marginal.

Petitioners' expansive reading of the Exception Clause would also encourage jurisdictional gamesmanship. By invoking Section 1442 or 1443, a defendant could use a meritless assertion of federal-officer or civil-rights jurisdiction to obtain appellate review, as of right, of every otherwise unreviewable removal theory rejected by the district court. The perverse incentives created by petitioners' construction cannot be prevented by the threat of sanctions, which are rare; by Section 1447(c) fee-shifting, which cannot be imposed if *any* ground for removal has facial plausibility; or by a *non*-textual judicial exception to the Exception Clause for frivolous or bad-faith assertions of Section 1442 or

1443 jurisdiction, which would prove far more difficult to enforce than the clear standard for applying the Exception Clause actually included in the text.

IV. The Court should not consider petitioners' novel "federal common law" theory of "arising-under" jurisdiction. The issue is not properly before this Court. It was not included in the Question Presented nor seriously argued in the briefs supporting certiorari. The Fourth Circuit never addressed it—and could not have addressed it—because petitioners' Fourth Circuit briefing waived the principal basis for that argument.

Petitioners' federal-common-law theory of removal also fails on its merits. Petitioners mischaracterize respondent's complaint and relevant precedent. Their novel theory would, moreover, require the Court to create a new body of federal common law and reject decades of precedent applying the "complete pre-emption" doctrine to complaints pleading state-law claims.

Petitioners' request illustrates the danger in their construction of Section 1447(d): it would create a loophole allowing defendants to avoid the statute's appellate bar by asserting a dubious federal-officer or civil-rights removal argument when "all they really want is a hook to allow appeal of some different subject." *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 813 (7th Cir. 2015); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 818–19 (10th Cir. 2020) ("no lawyer would neglect to find a defensible, if inadequate, way to assert" Section 1442 or 1443 grounds "to avoid the bar . . . for all other[s]").

ARGUMENT

I. The Text, Context, and Structure of Section 1447(d) Limit Appellate Review of Removal Grounds to Those Enumerated in the Exception Clause.

The first clause of Section 1447(d) (the Non-Reviewability Clause) strips appellate courts of jurisdiction to entertain appeals from remand orders. See *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127–28 (1995); *Hertz Corp. v. Friend*, 559 U.S. 77, 83 (2010); *Powerex Corp.,* 551 U.S. at 226. The second clause (the Exception Clause) carves out an exception to this general rule of non-reviewability, granting appellate jurisdiction to review a remand order in "case[s] . . . removed pursuant to section 1442 or 1443." 28 U.S.C. 1447(d).

Petitioners' argument founders for at least two independent reasons. First, the text, context, and structure of Section 1447(d) make clear that the Exception Clause authorizes review only of its two enumerated removal grounds. Second, this case was not removed "pursuant to" Section 1442 or 1443, meaning that it does not fall within the Exception Clause's jurisdictional grant.

A. The Exception Clause of Section 1447(d) Authorizes Appellate Review Only to the Extent Remand Was Denied on an Enumerated Removal Ground.

Petitioners stake their interpretation on the meaning of one word, "order," insisting that appellate review of an order necessarily entails review of all issues in that order. The Court has never imposed such a bright-line rule of construction, however. Instead, as with all statutory interpretation, "context determines meaning,"

Johnson v. United States, 559 U.S. 133, 139 (2010); statutes are not construed "in little bites," *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 643 (2006). The Court has thus not hesitated to limit review of a "decision," "judgment," or "decree" where the structure and context of the statute so requires.[1]

Here, the Exception Clause—when read as a whole—authorizes review of a remand order only insofar as it rejects Section 1442 and 1443 removal grounds. See *Samantar*, 560 U.S. at 319 ("[W]e do not construe statutory phrases in isolation; we read statutes as a whole." (cleaned up)).

1. Three statutes refute petitioners' assertion that if an "order" is reviewable on appeal, the appellate court must have authority to review every issue therein.

a. The Court has long construed 28 U.S.C. 1257 as cabining its review of a state-court judgment to a narrow universe of federal-law rulings incorporated into the judgment. Section 1257(a) provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may

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[1] There is no relevant distinction between those terms and "order" for purposes of defining the scope of review. See, *e.g.*, U.S. Br. 12 (noting that early versions of Section 1447(d) "used 'order' and 'decision' interchangeably") (quoting 1887 Act § 2, 24 Stat. 553); see also 28 U.S.C. 1292 (entitled "Interlocutory decisions," and authorizing appeal of various interlocutory "orders"); *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 45–46 (1995) (Section 1292 covers "interlocutory decisions"). Indeed, "judgments," "decrees," and "decisions" are simply categories of judicial "orders." *Decision*, *Black's Law Dictionary* (11th ed. 2019) ("esp., a ruling, order, or judgment"); *Judgment*, *id.* ("includes an equitable decree and any order from which an appeal lies."); *Decree*, *id.* ("a judicial decision," "[a] court's final judgment," "[a]ny court order").

be reviewed by the Supreme Court" in cases that raise questions of federal law concerning the validity of a statute or the assertion of federal rights. Under petitioners' theory, the Court would have jurisdiction to review all issues resolved by a state-court judgment.

For nearly 150 years, however, the Court has reviewed only the federal-law questions specified by Congress in Section 1257, explaining that this interpretation represents not only "a fair construction" of the statutory language, but the best construction in light of the context, congressional purpose, and federalism principles underpinning that provision. *Murdock*, 87 U.S. at 627, 630–32. The Court in *Murdock* noted that if the rule were otherwise, a party to a state-court proceeding could, "by the aid of a sagacious lawyer," present a federal defense that "he may well know will be decided against him the moment it is stated," to obtain review by this Court of state-law questions raised in the case. *Id.* at 629. Despite the unmodified statutory reference to "[f]inal judgments or decrees," the Court has long held that Section 1257 does not authorize it to "decide questions of state law in cases also raising federal questions." *Fay v. Noia*, 372 U.S. 391, 429 (1963), *abrogated on other grounds by Coleman v. Thompson*, 501 U.S. 722 (1991); see also *Fuller*, 417 U.S. at 48 n.9; *Murdock*, 87 U.S. at 627–33.

b. The Court's construction of 28 U.S.C. 1291 similarly limits review to specific issues in a decision or order. Section 1291 grants appellate courts "jurisdiction of appeals from all final decisions," including collateral orders that are effectively final. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009). Under petitioner's approach, *every* issue adjudicated in a collateral order would be reviewable

under Section 1291 if *any* issue in that order were reviewable. Yet the Court regularly limits appellate review to a particular portion of the lower court's collateral order. See 15A Wright & Miller, Fed. Prac. & Proc. Juris. § 3911.2 (2d ed.1996) ("Courts . . . keep[] close limits on the scope of appeal" of collateral orders).

In *Abney*, 431 U.S. at 662–63, for example, the Court held that an order denying a motion to dismiss was reviewable insofar as it rejected the criminal defendants' double-jeopardy challenge, but not insofar as it disposed of their challenge to the sufficiency of the indictment. The Court reasoned that "[a]ny other rule" would encourage defendants to assert "frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions" before the court of appeals. *Id.* at 663. In *Behrens*, 516 U.S. at 312–13, the Court restricted appellate jurisdiction even more narrowly, holding that appellate review from an order denying qualified immunity extends to "issue[s] of law relating to qualified immunity," but not to "determinations of evidentiary sufficiency at summary judgment."

c. The Court's interpretation of its direct appellate jurisdiction under the Criminal Appeals Act likewise confirms a limited scope of review where, as here, appellate jurisdiction is defined by reference to specific issues. Before 1907, the government had no right to appeal any judgment terminating a criminal prosecution in a defendant's favor. See *Carroll v. United States*, 354 U.S. 394, 399–403 (1957). The Criminal Appeals Act created, *inter alia*, a right of direct appeal in this Court "[f]rom a decision or judgment" dismissing any portion of an indictment, "where such decision or judgment is based upon the invalidity or construction of the statute upon which

the indictment is founded." See *Keitel*, 211 U.S. at 398 n.† (quoting Act of March 2, 1907, 34 Stat. 1246).

The Court held its review was "strictly limited" to the statutory challenges specified in the Act, and that it was "not at liberty to go beyond the question of the correctness of that construction and consider other objections to the indictment." *Borden Co.*, 308 U.S. at 192–93. Even where the lower court dismissed a single count in an indictment "upon two grounds, one of which concerned the construction of the statute, the other of which decided the invalidity of the indictment upon general principles of criminal law," the Court held it could not review the latter, which fell outside "the classes named in the statute giving a right of review in this court." *United States v. Stevenson*, 215 U.S. 190, 195–96 (1909). The Court retained that construction until Congress repealed the direct appeal provision in 1970. See, *e.g.*, *United States v. Fabrizio*, 385 U.S. 263, 266 (1966).

d. The Exception Clause therefore does not, as petitioners insist, unambiguously authorize plenary review of a remand order simply because it says that "an order . . . shall be reviewable." Section 1257, Section 1291, and the Criminal Appeals Act used similar language to create appellate jurisdiction over a lower court's ruling, yet the Court nevertheless cabined the scope of appellate review to specific issues.

2. Substantial textual evidence reveals that the Exception Clause, when read as a whole, authorizes review of its enumerated removal grounds—and those grounds only. See *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Harbison v. Bell*, 556 U.S. 180, 196 (2009) (Roberts, C.J., concurring) (statutory interpretation requires "reading sentences as a whole"); A. Scalia & B. Garner, Reading Law § 24 (2012).

a. The scope of review of an "order" in the Exception Clause is defined by the participial phrase "remanding a case . . . removed pursuant to section 1442 or 1443." 28 U.S.C. 1447(d); see also *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 502 (1998) ("[P]articipial phrases can narrow the relevant universe in an exceedingly effective manner."). When Congress carved out exceptions to Section 1447(d)'s blanket prohibition, it tethered the scope of appellate review to the federal-officer and civil-rights removal statutes. See *Georgia*, 384 U.S. at 786. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980); *Hillman v. Maretta*, 569 U.S. 483, 496 (2013); *United States v. Brockamp*, 519 U.S. 347, 352 (1997). Accordingly, the Exception Clause authorizes review of the enumerated removal grounds, and no others.

Petitioners' proposed construction of the Exception Clause "attributes to Congress a strange design." *Lawson v. FMR LLC*, 571 U.S. 429, 443 (2014). Sections 1442 and 1443 are the only grounds for removal identified in the Exception Clause. Yet petitioners insist that if a defendant's removal petition cites one of those provisions, an appellate court may review all grounds presented for removal, and if it finds any one of them valid, it need not consider Section 1442 or 1443 at all. See Pet. Br. 31. That result is inconsistent with the Exception Clause's "basic focus" on federal-officer and civil-rights removal grounds, the basis for the statutory carve-outs from Section 1447(d)'s jurisdictional bar. *Chadbourne & Parke*, 571 U.S. at 387 (construing 15 U.S.C. 78bb(f)(1)(A)). By focusing the Exception Clause on Sections

1442 and 1443, Congress evidenced a "targeted purpose" to authorize appellate review of those two removal grounds only. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 245–46 (2010) (adopting a "narrow reading" where "no other solution yields as sensible a result" (cleaned up)); *Things Remembered*, 516 U.S. at 136 (Ginsburg, J., concurring) ("Courts serve the legislature's purpose best by reading" clauses like Section 1447(d) "to make sense and avoid nonsense.").

b. The structure of Section 1447(d) also supports reading the Exception Clause as authorizing appellate review of federal-officer and civil-rights grounds only. See *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) (statutory language must be construed "in light of the structure of the statute and our precedent"). As this Court has repeatedly stated, the primary operation of Section 1447(d) is to "place[] broad restrictions on the power of federal appellate courts to review district court orders remanding removed cases to state court." *Things Remembered*, 516 U.S. at 127. That "structural choice[]" is evidenced by the sweeping language of the Non-Reviewability Clause, which prohibits review of an order remanding a case for lack of subject-matter jurisdiction by appeal, writ, or otherwise. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013) ("Just as Congress' choice of words is presumed to be deliberate, so too are its structural choices."). It is reinforced by the narrow framing of the Exception Clause, which references two specific grounds for removal and thus provides compelling textual evidence that Congress intended not to eviscerate the longstanding "strong congressional policy against of remand orders." *Things Remembered*, 516 U.S. at 136 (Ginsburg, J., concurring).

Petitioners' interpretation would upend this carefully calibrated design "through an expansive reading of a somewhat ambiguous exception." *Comm'r v. Clark*, 489 U.S. 726, 739 (1989). Although exceptions—like all statutory provisions—must be given "a fair reading," *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019), "[a]n exception to a 'general statement of policy' is 'usually read . . . narrowly in order to preserve the primary operation of the provision,'" *Maracich v. Spears*, 570 U.S. 48, 60 (2013) (quoting *Clark,* 489 U.S. at 739) "Unless commanded by the text," an exception "ought not operate to the farthest reach of [its] linguistic possibilities if that result would contravene the statutory design." *Maracich,* 570 U.S. at 60. Here, textual indications favor a narrow reading, and no construction of the Exception Clause could be *more* expansive than mandating plenary appellate review of remand orders whenever a defendant asserts Section 1442 or 1443 as a basis for removal, regardless of merit.

c. The consistent judicial construction of Section 1447(c) further confirms that Section 1447(d) permits review of some parts of a remand order, but not others. Section 1447(c) provides in relevant part: "An order remanding the case may require payment of just costs and actual expenses, including attorney fees, incurred as a result of the removal." Because Section 1447(d) must be read "*in pari materia* with § 1447(c)," *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 638 (2009), the "order remanding the case" in Section 1447(c) should have the same meaning as the "order remanding a case" in Section 1447(d).

Under petitioners' construction of that language, a grant or denial of fees or costs under Section 1447(c) would be reviewable *if and only if* the underlying removal order were reviewable under the Exception

Clause—that is, if the defendant cited Section 1442 or 1443 as one basis for removal. Otherwise, the fee determination would be unreviewable because, under petitioners' view, it is part of the "order remanding a case" and thus unreviewable by operation of the Non-Reviewability Clause.

Yet, every circuit court to consider the issue (all except the Federal Circuit) has held that Section 1447(d) does *not* preclude appellate review of the portion of a remand order that awards or denies fees or costs, even where the decision to remand is, itself, unreviewable. See, *e.g.*, *Knop v. Mackall*, 645 F.3d 381, 382 (D.C. Cir. 2011) (Kavanaugh, J.); *Ballard's Serv. Ctr., Inc. v. Transue*, 865 F.2d 447, 448 (1st Cir. 1989); *Calabro v. Aniqa Halal Live Poultry Corp.*, 650 F.3d 163, 165 (2d Cir. 2011); *Roxbury Condo. Ass'n, Inc. v. Anthony S. Cupo Agency*, 316 F.3d 224, 226–27 (3d Cir. 2003); *Client Prot. Fund of Bar of Maryland v. Hollis*, 412 F. App'x 597, 597 (4th Cir. 2011) (unpublished); *Miranti v. Lee*, 3 F.3d 925, 927–28 (5th Cir. 1993); *Stallworth v. Greater Cleveland Reg'l Transit Auth.*, 105 F.3d 252, 255 (6th Cir. 1997); *Tenner v. Zurek*, 168 F.3d 328, 329 (7th Cir. 1999); *Robinson v. Pfizer, Inc.*, 855 F.3d 893, 896 (8th Cir. 2017); *Moore v. Permanente Med. Grp., Inc.*, 981 F.2d 443, 445 (9th Cir. 1992); *Topeka Hous. Auth. v. Johnson*, 404 F.3d 1245, 1248 (10th Cir. 2005); *Legg v. Wyeth*, 428 F.3d 1317, 1319–20 (11th Cir. 2005). See also *Martin*, 546 U.S. at 134–35, 141 (assuming jurisdiction to review a district court's denial of a fee award under Section 1447(c) where removal was *not* premised on Section 1442 or 1443). As these cases demonstrate, the word "order" in Section 1447 refers to a district court's resolution of particular issues—such as whether to award fees, or whether a case is removable under Section 1442 or 1443—not to *every* ruling expressly or impliedly rendered in a document entitled "order."

d. The federalism concerns underpinning removal and remand statutes also favor this commonsense construction of the Exception Clause. It is a bedrock principle of "[o]ur system of cooperative judicial federalism" that state courts are adequate forums for adjudicating questions of both state and federal law. *McKesson,* slip op. at 4; see also *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1351 (2020); *Burt v. Titlow*, 571 U.S. 12, 19 (2013). To hold otherwise would "denigrate . . . coequal sovereigns." *Tafflin v. Levitt*, 493 U.S. 455, 466 (1990). Out of respect for the autonomy and authority of state courts, this Court has long required that "[s]tatutes conferring federal jurisdiction . . . be read with sensitivity to 'federal-state relations,'" *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 423 (2010), and that removal statutes "be strictly construed," *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002); see also *Shamrock*, 313 U.S. at 108–09.

Petitioners upend these federalism principles, questioning the competence of state courts to adjudicate cases remanded by federal district courts and suggesting that the speculative harms from a *potentially* mistaken remand ruling justify requiring federal appellate review of every theory of removal. Petitioners even propose that Congress intended the Exception Clause to protect defendants who are not federal officers and who are not enforcing civil-rights laws out of a generalized fear that these types of defendants may "face significant local prejudice." Pet. Br. 29. Petitioners' speculation, however, presume "the inherent inadequacy of state forums," contrary to this Court's repeated expressions of "confidence" in state courts' ability to "uphold federal law." *Coeur d'Alene*, 521 U.S. at 275.

3. Petitioners' remaining arguments fare no better.

a. Petitioners contend that the Non-Reviewability Clause's "reference to the 'order remanding a case' . . . is to the entire order," and that the Exception Clause's reference to "order" must be construed the same way. Pet. Br. 31. This Court has never held, however, that when the Non-Reviewability Clause governs an appeal, it bars review of all issues raised in the remand order. Cf. Part I.A.2.c, *supra* (award of fees and costs is reviewable). Indeed, the Court has tied the scope of the Non-Reviewability Clause to specific reasons for the remand, holding that Section 1447(d)'s jurisdictional bar applies only to remand orders that are "based on a ground specified in § 1447(c)." *Carlsbad Tech.,* 556 U.S. at 638. Petitioners themselves construe the word "order" in the Exception Clause as *not* including orders that reject frivolous or bad-faith invocations of Section 1442 or 1443 as a basis for remand. See Part III.3.c, *infra*.[2]

b. Petitioners contend that if Congress wanted to limit appellate review under the Exception Clause

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[2] Amicus United States suggests that this Court has already determined that an "order," as used in the Non-Reviewability Clause, "'cannot be disaggregated' into reviewable and unreviewable rulings." U.S. Amicus Br. 13–14 (quoting *Kircher*, 547 U.S. at 644 n.13 and *Powerex,* 551 U.S. at 236). Not so. The quoted language actually comes from the Court's application of *City of Waco v. U.S. Fidelity & Guaranty Co.*, 293 U.S. 140 (1934), which permits review of certain district court determinations that precede a remand order "in logic and in fact," *id*. at 143. *Kircher* and *Powerex* merely concluded that the order being appealed did not qualify as a *Waco* order because it was not separate from the remand order. *See Kircher*, 547 U.S. at 644 n.13; *Powerex Corp.*, 551 U.S. at 236. Those cases did not hold that review of a remand order must be coextensive with the four corners of that order.

to particular issues, it could have done so with greater clarity. See Pet. Br. 18. But that argument cuts against petitioners: if Congress wanted to make *all* issues raised in an appeal reviewable, it knows how to do so. See, *e.g.*, 18 U.S.C. 3595(c)(1) ("The court of appeals shall address all substantive and procedural issues raised on the appeal of a sentence of death."); 5 U.S.C. 1508 ("The court shall review the entire record including questions of fact and questions of law."); 38 U.S.C. 7104(a) ("All questions in a matter . . . shall be subject to one review on appeal to the Secretary."); 33 U.S.C. 1320(f) ("The district court . . . shall consider and determine de novo all relevant issues."). The *best* interpretation of what Congress wrote in Section 1447(d) is that the Exception Clause authorizes review only of its enumerated removal grounds. See *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 416 (2012) ("[T]he mere possibility of clearer phrasing cannot defeat the most natural reading of a statute.").

c. Finally, petitioners cite several decisions by this Court that construed 28 U.S.C. 1292 and 1253 as authorizing plenary appellate review—most notably, *Yamaha*'s construction of Section 1292(b). See Pet. Br. 21–23. None of these cases, however, set forth a universal rule governing the scope of appellate review. See Pet. App. 9a (*Yamaha* did not "purport to establish a general rule governing the scope of review for every statute" that uses the word "order."); *Boulder*, 965 F.3d at 807 (same); *Rhode Island v. Shell Oil Prods. Co, LLC,* 979 F.3d 50, 58 (1st Cir. 2020) (same); *San Mateo*, 960 F.3d at 596–97 (same). They illustrate that *some* grants of appellate jurisdiction provide for plenary review—not that *all* do so.

Context, moreover, distinguishes these statutes from Section 1447(d). Section 1292(b), for example,

provides a discretionary right of appeal from an interlocutory order that "involves a controlling question of law as to which there is a substantial ground for difference of opinion." 28 U.S.C. 1292(b). By using the word "involves," Congress signaled that a Section 1292(b) "order" is broader than the "controlling question of law," meaning that appellate review of the "order" may entail review of issues other than the certified question. Section 1447(d), by contrast, does not contain similar language indicating that review of remand orders extends beyond the two enumerated removal grounds in the Exception Clause.

Section 1292(b) also vests the district and circuit courts with discretion to disallow the appeal; the district court must "be of the opinion" that review is appropriate, and the court of appeals "may thereupon, in its discretion, permit an appeal . . . ." Section 1447(d) has no discretionary component, and petitioners' construction would thus not only allow, but mandate plenary review whenever removal is alleged under Section 1442 or 1443.

Moreover, Sections 1292 and 1253 authorize review of *interlocutory* decisions, whereas remand orders function as *final* decisions that result in "the district court disassociat[ing] itself from the case entirely." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 713–14 (1996). When the Court construed Sections 1292 and 1253 to authorize plenary review of issues not enumerated in the statutes themselves, it simply permitted review of issues that would eventually be reviewable on appeal from final judgment—a sensible construction that avoids piecemeal appellate review and accelerates a final determination on the merits. If, however, the Court read Section 1447(d) to authorize plenary review of removal grounds not identified in the Exception Clause, it would permit review of issues

that are generally unreviewable—a construction that risks expanding the "limited jurisdiction" of federal courts "by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

Thus, reading the Exception Clause to authorize review of its enumerated removal grounds (and no others) is not only supported by the language, context, and structure of Section 1447(d). It is entirely consistent with this Court's precedent.

B. This Case Was Not Removed "Pursuant to" Section 1442 or 1443.

Respondent should also prevail for an independent reason: Even if petitioners' interpretation of "order" as allowing appellate review of all issues in the order were otherwise correct, Section 1447(d) by its terms limits appellate jurisdiction to cases removed "pursuant to section 1442 or 1443." Where, as here, the defendants' asserted grounds for removal under Section 1442 or 1443 lack merit, the removal is not "pursuant to" those grounds, and the appellate court's jurisdiction ends. Petitioners gloss over this precondition for obtaining appellate jurisdiction under the Exception Clause, asserting that any case in which a defendant merely cites an enumerated ground in its removal petition qualifies. Pet. Br. 12. That interpretation, however, conflicts with the plain meaning of "pursuant to," which carves out a narrow exception from Section 1447(d)'s jurisdictional bar for cases removed "in compliance with," "in accordance with," and "in conformance to" the requirements set forth in Section 1442 or 1443.[3]

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[3] Respondent has never conceded that a case has been removed "pursuant to" Section 1442 or 1443 any time a "notice of removal asserts that the case is removable" on one of those grounds. Pet. Br. 12; see also U.S. Amicus Br. 10; Br. of State

1. By its terms, the Exception Clause grants appellate jurisdiction only in cases "removed pursuant to section 1442 or 1443." 28 U.S.C. 1447(d). Any other case is covered by the Non-Reviewability Clause and is therefore "not reviewable." *Id*. Thus, before an appellate court can invoke the Exception Clause as a jurisdictional basis for reviewing the remand order, it must first determine whether removal was in fact accomplished "pursuant to" either of the two enumerated provisions.

2. Congress did not define "pursuant to" in the removal statutes, but the term ordinarily means "'in accordance with' or 'in conformance to.'" *SAS Inst.*, 138 S. Ct. at 1355–56 (brackets omitted). When Congress added the civil-rights exception to Section 1447(d) in 1964, contemporary dictionaries defined the term to mean: "in conformance to," *Webster's Seventh New Collegiate Dictionary* 694 (1963); "in accordance with," *American Heritage Dictionary* 1062 (1969); and "in accordance," *Black's Law Dictionary* 1401 (4th ed. 1951). The same was true when Congress passed the 2011 Removal Clarification Act, with Black's Law Dictionary listing the first two definitions of "pursuant to" as "[i]n compliance with" and "in accordance with." *Black's Law Dictionary* 1431 (10th ed. 2014); see also *Pursuant*, *Oxford Dictionary of English Online* (3d ed. 2010) ("in accordance with").

Amici for Pet. 5, 9–10. Respondent argued to the contrary in the court below. See Fourth Cir. Tr., 22:11–16 (Dec. 11, 2019) ("1447(d) refers to an order 'pursuant to' the two enumerated sections. So it's limited to those grounds.") Even if respondent had not raised this argument below, it would be free to do so here: it falls within the Question Presented, see Pet. I, and parties—especially respondents—"are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

The Court likewise uses this definition when construing statutory and constitutional provisions. See *SAS Inst.*, 138 S. Ct. at 1356 (35 U.S.C. 314); *Alden*, 527 U.S. at 731 (U.S. Const., art. VI). So do lower courts. See, *e.g.*, *Patel v. Attorney Gen.*, 599 F.3d 295, 298 (3d Cir. 2010); *Price v. Medicaid Dir.*, 838 F.3d 739, 749 (6th Cir. 2016); *United States v. Lee*, 659 F.3d 619, 622 (7th Cir. 2011); *United States v. DeCay*, 620 F.3d 534, 544 (5th Cir. 2010); *United States v. Copeland*, 381 F.3d 1101, 1107 (11th Cir. 2004); *All. Envtl., Inc. v. Harrison W. Constr. Corp.*, 94 F.3d 644 (Table) (6th Cir. 1996) (unpublished).

3. Given its ordinary meaning at the time of enactment, the phrase "a case . . . removed pursuant to section 1442 or 1443" means a case that in fact accords, conforms, or complies with the requirements set forth in one of those removal statutes. The Court's interpretation of the same or indistinguishable terms in three legal provisions supports this plain-meaning construction.

a. In *SAS Institute*, the Court considered 35 U.S.C. 314(b), which requires the Director of the Patent Office to "decide 'whether to institute an inter partes review [of patent claims] . . . pursuant to a petition.'" 138 S. Ct. at 1355–56. "[B]y using the term 'pursuant to,'" the Court explained, Congress limited the scope of an inter partes review of a petitioner's patent claims by requiring it to "proceed[] 'in accordance with' or 'in conformance to' the petition" filed. *Id.* (quoting *Oxford English Dictionary* (3d ed., Mar. 2016)). That meant the Director had no "license to depart from the petition and institute a *different* inter partes review of his own design." *Id.* at 1356. The Court thus read the phrase "pursuant to a petition" as requiring inter partes review to conform to a petition's substantive contents, not as authorizing a freewheeling inquiry by the Director any time a petition is filed.

b. In *Alden*, 527 U.S. 731–32, the Court reached a similar conclusion construing the Supremacy Clause, which declares that "the Laws of the United States . . . made *in Pursuance* [of the Constitution] . . . shall be the supreme Law of the Land," U.S. Const., art. VI, cl. 2 (emphasis added). The Court read "in pursuance of" to mean "consistent with" or "accord[ing] with." *Alden,* 527 U.S. at 731–32 (observing that its construction was made "evident from [the] text"); see also *Printz v. United States*, 521 U.S. 898, 924–25 (1997) (laws made "in Pursuance of the Constitution" must "accord with the Constitution" (cleaned up)). For purposes of the Supremacy Clause, then, a federal statute qualifies as "the supreme Law of the Land" only if it conforms to, and does not violate, the Constitution's restrictions on Congress's lawmaking authority—*i.e.,* the statute must be a valid exercise of Congress's enumerated powers and not transgress any constitutional prohibitions. See, *e.g., Alden*, 527 U.S. at 731–32; *Printz*, 521 U.S. at 925–26; *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (under the Supremacy Clause, "Congress may impose its will on the States," "[a]s long as it is acting within the powers granted it under the Constitution"); *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality) (Supremacy Clause requires treaties to "comply with the provisions of the Constitution"); *Collins v. Virginia*, 138 S. Ct. 1663, 1679 (2018) (Thomas, J., concurring); *Gordon v. United States*, 117 U.S. 697, 705 (1864).

c. Construing Congress's use of the word "under" to mean "'in accordance with' or 'according to,'" the Court made clear in *Pereira*, 138 S. Ct. at 2117, that an action taken "'in accordance with' or 'according to'" a particular statute ordinarily refers to an action that complies with the statute's requirements. *Pereira* concerned "the so-called 'stop-time rule'" in 8 U.S.C.

1229b(d)(1)(A), which provides that a noncitizen's period of continuous presence in the United States ends when the government serves the noncitizen with "'a notice to appear under section 1229.'" *Id.* at 2109. Section 1229(a), in turn, requires the government to serve a noncitizen subject to removal proceedings with a "notice to appear" that specifies, among other things, "[t]he time and place at which the proceedings will be held." 8 U.S.C. 1229(a). Reading the statutes together, the Court in *Pereira* concluded that the government could not "trigger the stop-time rule" by serving "a noncitizen with a document that is labeled 'notice to appear,' but . . . [that] fails to specify either the time or place of the removal proceedings." 138 S. Ct. at 2110. Instead, the government must serve "a 'notice to appear' '[i]n accordance with' or 'according to' the substantive time-and-place requirements set forth in § 1229(a)." *Id.* at 2117. That meant, the Court explained, that "[a] putative notice to appear" only qualifies as "a notice to appear under section 1229(a)" if it actually satisfies Section 1229(a)'s time-and-place requirements. *Id.* at 2113–14.

d. The Court's analysis in those cases applies with equal force here. To invoke the Exception Clause, a defendant must do more than merely *assert* Section 1442 or 1443 removal grounds; it must show that the removal in fact satisfies the "substantive [removal] requirements set forth in § [1442 or 1443]." *Id.* at 2117. Accordingly, if the court of appeals concludes that a case satisfies the removal requirements in Section 1442 or 1443, then it has jurisdiction under the Exception Clause and can reverse the remand order. If, however, the appellate court concludes that the case is *not* removable under Section 1442 or 1443, then the court may not address any other grounds for removal because the case was not removed "pursuant to" Section 1442 or 1443.

4. This plain-meaning interpretation of "pursuant to" also accords with how Congress used that term elsewhere in the removal statutes. For example, Section 1446(a) states that "defendants desiring to remove any civil action from a State court shall file . . . a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure." There, "pursuant to" Rule 11 can only mean "in compliance with" the signature requirements of Rule 11(a) and the good-faith requirements of Rule 11(b). See, *e.g., Mayo v. Bd. of Educ. of Prince George's Cty.*, 713 F.3d 735, 742 (4th Cir. 2013); *Harper v. AutoAlliance Int'l, Inc.*, 392 F.3d 195, 201–02 (6th Cir. 2004); *RES-GA Cobblestone, LLC v. Blake Const. & Dev., LLC*, 718 F.3d 1308, 1311 n.1 (11th Cir. 2013); *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1225 (9th Cir. 2009). Because "identical words used in different parts of the same statute are generally presumed to have the same meaning," *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005), Congress presumably used "pursuant to" in Section 1447(d) to mean "in compliance with" the requirements set forth in the civil-rights and federal-officer removal statutes.

5. It is not uncommon for jurisdictional statutes to require courts to address the merits of an issue or claim in determining their own jurisdiction, as the Exception Clause does here. See, *e.g., Bolivarian Republic of Venezuela*, 137 S. Ct. at 1319 (to determine whether 28 U.S.C. 1605 grants jurisdiction, courts must first decide whether property was "taken in violation of international law"); *Ruiz*, 536 U.S. at 626–28 (to determine whether 18 U.S.C. 3742(a)(1) authorized criminal defendant's appeal, appellate court must evaluate merits of constitutional claim); *Leocal v. Ashcroft*, 543 U.S. 1, 3–4, 5 n.3 (2004) (to determine whether 8 U.S.C. 1252(a)(2)(C) precluded review of a final order of removal, appellate court

had to decide whether petitioner was removable by reason of having committed certain criminal offenses); *Kircher*, 547 U.S. at 643–44 (to determine whether 15 U.S.C. 77p(c) authorized removal jurisdiction, district court had to determine whether 15 U.S.C. 77p(b) precluded the action from being maintained in any state or federal court); *Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp.*, 603 F.3d 23, 27–28 (2d Cir. 2010) (to determine whether 28 U.S.C. 1453(d)(3) precluded appellate review of remand order, appellate court had to decide whether district court properly remanded the case for lack of jurisdiction under 28 U.S.C. 1332(d)(9)(C)).

When a statute intertwines "merits and jurisdiction" federal courts can and must decide the merits to assure themselves of jurisdiction. *Bolivarian Republic*, 137 S. Ct. at 1319. This point is illustrated by 28 U.S.C. 1605(a)(3), which carves out an exception to foreign sovereign immunity and "grants jurisdiction only where there is a *valid* claim that 'property' has been 'taken in violation of international law.'" *Id.* at 1318 (emphasis added). Under that provision, a "nonfrivolous argument" that the requisite taking has occurred—or even a "good argument" to that effect—is "insufficient to confer jurisdiction." *Id.* at 1316, 1324. Instead, the plaintiff must "show (not just arguably show) a taking of property in violation of international law." *Id.* at 1324. The courts, for their part, must "answer th[is] jurisdictional question," even if doing so "inevitably decide[s] some, or all, of the merits issues" in the case. *Id.* at 1319.

Similarly here, the plain text of Section 1447(d) requires an appellate court to decide the merits of any asserted Section 1442 and 1443 basis for removal

to determine its jurisdiction. Had Congress intended to authorize jurisdiction based on mere allegations of legal authority, it could have said so, as it has often done. See, *e.g.,* 15 U.S.C. 78aa(b); 42 U.S.C. 2297h-8(a)(7)(C); 28 U.S.C. 1338(b); 28 U.S.C. 1354; 25 U.S.C. 3013; 44 U.S.C. 2204(e). That Congress chose not to use "allegation" language in the Exception Clause underscores its intent to limit appellate jurisdiction to *valid* assertions of Section 1442 or 1443 as a basis for removal. See *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 329 n.22 (1981) ("We prefer to read the statute as written.").

6. Petitioners invoke two definitions of "pursuant to," neither of which helps them. First, they acknowledge that "pursuant to" generally means "in accordance with." Pet. Br. 19. As explained above, applying that definition of "pursuant to" means that the Exception Clause extends appellate jurisdiction only to cases that satisfy the requirements in Section 1442 or 1443. See Part I.B.2, *supra*; see also *Accordance*, *Oxford Dictionary of English Online* (3d ed. 2010) ("in accordance with" means "in a manner conforming with"). Second, Petitioners cite a secondary definition of "pursuant to" as meaning "by reason of." Pet. Br. 19. But just because a definition may be "acceptable" does not make it the "ordinary" or "most common meaning" of a term, much less the proper statutory meaning. *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 568 (2012). Here, "by reason of" is not the most common definition of "pursuant to," as a review of the parties' cited dictionaries reveals. See Part I.B.2, *supra*; Pet. Br. 19. It is not the definition that Congress relied on when it used "pursuant to" in Section 1446(a). See Part I.B.4.a, *supra*. And it is not the definition that this Court has used when interpreting "pursuant to" in other statutory and constitutional provisions. See

Part I.B.3, *supra*. Petitioners fail to identify a single instance in which the Court has construed "pursuant to" to mean "by reason of" in a statute.

In short, this Court should read "pursuant to" to mean "in accordance with," "in conformance to," or "in compliance with." Guided by that ordinary-meaning interpretation, it should conclude that the court of appeals' jurisdiction ended once it held that petitioners did not satisfy the removal requirements of Section 1442 or 1443. That construction of the Exception Clause "makes word-by-word linguistic sense." *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 530 (2013). It fits the statutory context. It avoids the anomalous results that, as discussed above, follow from reading the Exception Clause to swallow the Non-Reviewability Clause. See Part I.A.2, *supra*. And it accords with the purpose of Section 1447(d), as shown below.

II. In 2011, Congress Ratified Five Decades of Unanimous Judicial Authority That Construed the Exception Clause as Authorizing Review Only of Its Enumerated Removal Grounds.

When Congress enacted the Removal Clarification Act of 2011 and added two words ("1442 or") to the Exception Clause, it ratified the circuit courts' uniform construction of that clause as limiting the scope of appellate review to the grounds for removal expressly identified in Section 1447(d).

1. This Court generally assumes that "Congress is . . . aware of an administrative or judicial interpretation of a statute." *Lorillard v. Pons*, 434 U.S. at 580. Thus, "[i]f a [statutory] word or phrase has been given a uniform interpretation by inferior courts, a later version

of that act perpetuating the wording is presumed to carry forward that interpretation." *Texas Dep't,* 576 U.S. 536 (cleaned up). Contrary to petitioners' insistence, see Pet. Br. 34–35, this canon is not limited to the enactment of new statutes or the wholesale reenactment of old ones. It applies with full force where, as here, Congress has amended a statutory provision without changing the language at issue. See, *e.g.*, *Texas Dep't*, at 536; *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 243 n.11 (2009); *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 113–14 (2011).

By the time Congress amended Section 1447(d) in the Removal Clarification Act, five decades of unbroken appellate court holdings had settled the meaning of the Exception Clause. Between 1964 and 2011, nine circuits concluded that by its terms, and in the context of Section 1447(d) as a whole, the Exception Clause limited the scope of review to the civil-rights removal statute. See, *e.g., Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 533–34 (6th Cir. 1970) (declining to review non-designated removal grounds "[b]ecause of the limited scope of appellate review of remand orders authorized" by Section 1447); *Pennsylvania ex rel. Gittman v. Gittman*, 451 F.2d 155, 156–57 (3d Cir. 1971) (reviewing appeal of Section 1443 removal grounds while holding "a decision on removal under § 1441 is not appealable"); *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976) ("Jurisdiction to review remand of a § 1441(a) removal is not supplied by also seeking removal under § 1443(1)."); *Robertson v. Ball*, 534 F.2d 63, 65 (5th Cir. 1976) ("appeal must be dismissed" as to Section 1441 but "[t]he removal effected under § 1443 stands in a different posture"); *Detroit Police Lieutenants & Sergeants Ass'n v. City of Detroit*, 597 F.2d 566, 567–68 (6th Cir. 1979) (Section 1441 grounds not reviewable, but "Section 1447(d)

expressly permits review of a remand order where the removal is based upon Section 1443"); *State Farm Mut. Auto. Ins. Co. v. Baasch*, 644 F.2d 94, 96–97 (2d Cir. 1981) (dismissing appeal "for want of appellate jurisdiction" as to Section 1441 but reviewing Section 1443 grounds because Section 1447(d) "expressly mak[es] such orders reviewable"); *Sanchez v. Onuska*, 2 F.3d 1160 (Table), 1993 WL 307897 (10th Cir. 1993) (unpublished) (same); *Thornton v. Holloway*, 70 F.3d 522, 524 (8th Cir. 1995) (same); *Davis v. Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997) (same); *Alabama v. Conley*, 245 F.3d 1292, 1293 (11th Cir. 2001) (same); *Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006) (same); see also Opp. Cert. 11–14 (collecting cases). Not one court during those 47 years deviated from this common-sense construction.

Against the backdrop of nine circuit courts' consistent construction, Congress's decision in 2011 to amend the Exception Clause by adding a reference to federal-officer jurisdiction, "while still adhering to the operative language" and structure of Section 1447(d), provides "convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals." *Texas Dep't*, 576 U.S. at 536. The amendment reaffirms Congress's intent to limit appellate review only to those grounds specifically designated in the Exception Clause.

2. Petitioners contend that the meaning of Section 1447(d) was not "settled" in 2011 because courts had "interpreted the term 'order' in *other* statutes" to authorize review of an entire order. Pet. Br. 34 (emphasis added). As this Court has recently reconfirmed, however, "the ratification canon . . . derives from the notion that Congress is aware of a definitive judicial interpretation of a statute when it reenacts the

same statute using the same language." *Food Mktg. Inst.*, 139 S.Ct. at 2365. Judicial interpretations of other statutes cannot unsettle the longstanding, unanimous construction of Section 1447(d).

Petitioners also suggest that Congress could not have intended to ratify the circuit courts' uniform construction of the Exception Clause because the courts' decisions were, in petitioners' view, too "conclusory." Pet. Br. 34. But the fact that nine circuits across five decades uniformly found the meaning of the statute obvious does not detract from their conclusion. In any event, this Court has never suggested that ratification turns on the length of judicial opinions; instead, it turns on whether "the uniformity" of "judicial interpretations" has sufficiently "settled the meaning" of the disputed statutory language. *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998); see also *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018); *Lorillard*, 434 U.S. at 580; Scalia & Garner, § 54 ("The criterion ought to be whether the uniform weight of authority is significant enough that the bar can justifiably regard the point as settled law."). Here, the meaning of the Exception Clause was settled when Congress amended Section 1447(d).

Petitioners' argument that congressional *in*action is insufficient to ratify judicial construction of a statute, Pet. Br. 34–35, is inapposite. Congress affirmatively amended Section 1447(d) to add a second exception to non-reviewability, while leaving the operative language ("except that an order remanding a case . . . removed pursuant to") intact. By 2011, that language had been consistently construed by every circuit court that examined it. Had Congress intended to impose a different construction, it would have given some indication. "Quite obviously, reenacting precisely the

same language would be a strange way to make a change." *Pierce v. Underwood*, 487 U.S. 552, 567 (1988); cf. *Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 139 S. Ct. 628, 633–34 (2019).

III. Limiting Review under the Exception Clause to Section 1442 and 1443 Removal Grounds Best Advances the Purposes of Section 1447(d).

Section 1447(d) read as a whole reflects Congress's strong "interest in avoiding prolonged litigation on threshold nonmerits questions" of removability. *Powerex*, 551 U.S. at 237. Congress's longstanding prohibition of most appellate review of remand orders "reduce[s] the high cost of litigation." *Osborn v. Haley*, 549 U.S. 225, 268 (2007) (Scalia, J., dissenting) (Section 1447(d) is "an all-too-rare effort to reduce the high cost of litigation"). It decreases docket congestion in the federal appellate courts. See Pet. Br. 30 (citing evidence that Congress enacted Section 1447(d) to reduce judicial "backlog"); Thomas R. Hrdlick, *Appellate Review of Remand Orders in Removed Cases: Are They Losing A Certain Appeal?*, 82 Marq. L. Rev. 535, 542 (1999) (same); cf. *Martin*, 546 U.S. at 140 (Section 1447(c)'s fees provision reflects Congress's concern that unjustified removal "delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources"). And it furthers important principles of federalism. The Fourth Circuit's construction of Section 1447(d) advances each of these important goals. Petitioners' does not.

1. Petitioners' proposed construction of the Exception Clause would require litigants to devote considerable time and resources to briefing multi-issue remand appeals and would force appellate courts to expend "scarce federal judicial resources" adju-

dicating those appeals. *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). Petitioners assert that those additional burdens will be "marginal (at most)." Pet. Br. 30. The facts and history of this case demonstrate otherwise.

Petitioners advanced eight separate grounds for removal jurisdiction in the district court, including not only federal-officer jurisdiction and a novel theory of arising-under jurisdiction based on federal common law, but also theories based on admiralty jurisdiction, bankruptcy jurisdiction, federal enclave jurisdiction, the Outer Continental Shelf Lands Act, and others. J.A. 203–41. The parties devoted 180 pages to briefing those grounds for remand in the district court (petitioners' brief dedicated six pages to federal-officer removal), based on petitioners' 49-page Notice of Removal, four supporting declarations, and 43 exhibits, comprising 1,103 pages of materials. The district court required 46 pages to analyze and reject each of petitioners' "proverbial 'laundry list' of grounds for removal." See Pet. App. 34a–35a. It disposed of federal-officer removal in under four. *Id.* at 68a–72a. Construing the Exception Clause to give disappointed defendants the statutory right to appellate review of every argument for removal rejected by the district court, simply because one asserted ground was federal-officer or civil-rights jurisdiction, would impose substantial burdens on the appellate courts and necessarily result in considerable delays. See, *e.g.*, *Davila v. Davis*, 137 S. Ct. 2058, 2069 (2017) (recognizing that the burdens of litigation are often a function of the number and complexity of appellate issues).

2. Petitioners' expansive construction, if accepted, would also increase the number of appeals taken from

remand orders by encouraging defendants to add federal-officer or civil-rights grounds to their removal notices to secure an otherwise-unavailable pathway to appeal, as petitioners have done.

This Court has always assessed with clear eyes the risks of jurisdictional "gamesmanship." *Hertz,* 559 U.S. at 94; *Abney*, 431 U.S. at 663 (noting risk that alternate construction of jurisdictional statute "would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise non-appealable questions to the attention of the courts of appeals prior to conviction and sentence"); *Swint*, 514 U.S. at 49–50; *Murdock*, 87 U.S. at 629. The Seventh Circuit acknowledged this very risk in *Lu Junhong*, conceding that under its construction of Section 1447(d), "[s]ome litigants may cite § 1442 or § 1443 in a notice removal when all they really want is a hook to allow appeal of some different subject," 792 F.3d at 813—precisely what happened here. See *Boulder*, 965 F.3d at 818–19 ("no lawyer would neglect to find a defensible, if inadequate, way to assert" 1442 or 1443 grounds "to avoid the bar . . . for all other[s]"); 15A Wright & Miller, Fed. Prac. & Proc. Juris. § 3911.2 (2d ed. 1996) (noting in the context of the collateral order doctrine, "[t]his fear has genuine substance.")

3. Petitioners offer several suggestions for how appellate courts could ameliorate the burdens that would result from adopting petitioners' construction of the Exception Clause. None have practical utility, however, and there is no evidence Congress gave them any weight either in 1964 or 2011.

a. Petitioners suggest that appellate courts could avoid difficult questions of federal-officer or civil-rights removal jurisdiction simply by "resolving the appeal

based on an alternative ground for removal that is more clearly meritorious." Pet. Br. 31. But under petitioners' construction, which directs courts to review the precise issues Congress has prohibited them from reviewing, appellate courts would still have to analyze each issue to evaluate which is most "clearly meritorious"; and if none of those issues were sufficiently meritorious to require reversal, the appellate court would have to address every ground advanced by the defendants before affirming the district court.

b. Next, petitioners assert that the fee-shifting authority provided by 28 U.S.C. 1447(c), the good-faith obligations imposed by Federal Rule of Civil Procedure 11, and the courts' "inherent authority to sanction" bad faith litigation conduct would dissuade defendants from using Section 1442 or 1443 as a jurisdictional hook to gain appellate review of more meritorious removal grounds. Pet. Br. 35.

None of these provisions would have significant deterrent effect. A defendant that makes a frivolous Section 1442 or 1443 argument can avoid an award of Section 1447(c) fees merely by asserting another removal ground that is "objectively reasonable." *Martin*, 546 U.S. at 141. As for sanctions under Rule 11 or its appellate counterpart, courts "rarely" impose them. *In re Green Hills Dev. Co., L.L.C.*, 741 F.3d 651, 660 (5th Cir. 2014); see also *Ario v. Underwriting Members of Syndicate 53*, 618 F.3d 277, 297 (3d Cir. 2010). The standard for such sanctions is extremely demanding, and in practice, courts reserve sanctions for the most "extreme cases." *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998); see also *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) ("Rule 11 . . . deter[s] baseless filings"); Fed. R. App. P. 38. Rule 11, moreover, requires a 21-day safe-harbor period

before a plaintiff may move for sanctions, further exacerbating the pre-remand delay that Congress sought to minimize. See Fed. R. Civ. Proc. 11(c)(2).

c. Petitioners suggest that appellate courts could dismiss appeals for lack of jurisdiction where an asserted federal-officer or civil-rights ground for removal is "wholly insubstantial and frivolous." Pet. Br. 36. That "nonfrivolous-argument standard" does not derive from the text of Section 1447(d), however. Instead, it would be a judge-made standard similar to that applied to some jurisdictional statutes, most notably the federal-question jurisdiction statute, 28 U.S.C. 1331. See *Rosado v. Wyman*, 397 U.S. 397, 404 (1970); *Bell v. Hood*, 327 U.S. 678, 682–83 (1946). There is no need to create such a difficult to police, implied restriction on the scope of the Exception Clause, because the statutory language already limits appellate review to cases where removal was in fact "pursuant to" Sections 1442 or 1443. See 13D Wright & Miller, Fed. Prac. & Proc. § 3564 (3d ed. 2020) (collecting critiques of the nonfrivolous-argument standard).

4. Petitioners speculate that Congress meant the Exception Clause to authorize plenary appellate review because any case in which a defendant asserts a federal-officer or civil-rights ground for removal, even erroneously, "may implicate vital federal interests" for some other reason. Pet. Br. 28. That cannot be right. Many categories of removable cases "implicate" federal concerns, for example because they involve foreign sovereign defendants, 28 U.S.C. 1441(d), or necessarily raise a substantial and disputed question of federal law, *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). But for more than 130 years, the law has been settled that when a defendant removes in reliance on

such grounds and the district court remands, the remand is unreviewable "whether erroneous or not and whether review is sought by appeal or by extraordinary writ." *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 343 (1976); *Powerex*, 551 U.S. at 236–37 (rejecting argument that "sensitive foreign-relations implications" can override Non-Reviewability Clause). There has never been an exception to the Non-Reviewability clause for cases the court of appeals believes may implicate federal interests. There is no basis to conclude Congress created such an exception for defendants who allege, wrongly, that they are entitled to remove under Section 1442 or 1443.[4]

The structure, context, and purpose of Section 1447(d) all support a single, linguistically sensible construction of the Exception Clause as permitting appellate review of a district court remand order only to the extent the order rejects removal based on Section 1442 or 1443. That was the interpretation that appellate courts uniformly followed from 1964 until *Lu Junhong* was decided in 2015. It was the interpretation that Congress ratified when it enacted the Removal Clarification Act of 2011. It is the interpretation the First, Fourth, Ninth and Tenth Circuits have followed post-*Lu Junhong*. And it is the interpretation that this Court should adopt in this case.

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[4] The 2011 legislative history confirms that Congress sought to protect the narrow class of defendants entitled to assert federal-officer jurisdiction, not all defendants with generalized federal interests. See House Judiciary Committee Report, H.R. Rep. No. 112-17, at 4 (2011) (amendment was necessary because Section 1447(d)'s Exception Clause "has no application to suits involving Federal officers and § 1442. This restriction means remanded cases brought against Federal officers . . . cannot find their way back to Federal court").

IV. The Court Should Not Reach Petitioners' "Arising-Under" Jurisdiction Arguments.

The Question Presented raises one issue: whether the Fourth Circuit erred in its construction of 28 U.S.C. 1447(d). Petitioners did not seek review of the lower courts' rejections of their federal-officer jurisdiction arguments on the merits, or any of their other removal theories. Now, in their opening brief, petitioners ask this Court to decide the merits of one of those other grounds—"arising-under" jurisdiction based on federal common law. See Pet. Br. 37–45.

This Court should refuse the request. Section 1447(d) bars this court, like the Fourth Circuit, from considering any ground other than federal-officer jurisdiction, which petitioners chose *not* to challenge here. If the Court disagrees with the Fourth Circuit's construction of Section 1447(d), it should remand so that court can review petitioners' other removal grounds.

A. Petitioners Have Not Preserved Their "Arising-Under" Jurisdiction Arguments.

Petitioners' argument that the district court should have asserted jurisdiction under 28 U.S.C. 1331 is not properly before this Court.

1. The petition raised a single Question Presented, and petitioners represented that "as it comes to the Court, this case presents *only* that question." Cert. Reply Br. 9 (emphasis added). The Court "strongly disapprove[s of] the practice of smuggling additional questions into a case after [it] grant[s] certiorari," *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993) (quotation marks omitted), and should reject petitioners' effort to do so.

"'[O]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court.'" *Yee*, 503 U.S. at 535 (quoting Supreme Court Rule 14.1(a)); see also Rule 24.1(a) (merits briefs "may not raise additional questions or change the substance of the questions already presented" in the petition). A question is "fairly included" in a petition only if it is a "necessary predicate to the resolution of the question presented in the petition," *Caspari v. Bohlen*, 510 U.S. 383, 389–90 (1994), or "essential to [the] analysis," *Missouri v. Jenkins*, 515 U.S. 70, 84 (1995). Those rules establish a "heavy presumption" against consideration of newly raised issues that the Court will disregard "only in the most exceptional cases." *Izumi*, 510 U.S. at 32 (quotation marks omitted).

Petitioners did not include their new "arising-under" argument in their petition or briefs in support of certiorari (which would have been insufficient regardless, see *Wood v. Allen*, 558 U.S. 290, 304 (2010)). Nor is this purported ground for removal a "necessary predicate" to the Court's construction of Section 1447(d) or "essential" to that analysis; it has no bearing on the Question Presented.

Petitioners nonetheless contend the Court should reach their arising-under argument because they have asserted it in other cases. Pet. Br. at 27. That is not an "exceptional" circumstance. Respondent should have the right to demonstrate, in response to a properly presented Question Presented and "in advance of litigation on the merits," that petitioners' theory is "not worthy of review." *Yee*, 503 U.S. at 536. Indeed, all the lower courts to consider it on the merits have rejected it. See *City of Oakland v. BP, PLC*, 969 F.3d 895, 905–08 (9th Cir. 2020) (reversing the only district court decision to accept petitioners' jurisdictional

theory in one of these cases); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 39–41 (D. Mass. 2020) (collecting cases).

2. This Court routinely declines to reach issues not addressed by the courts of appeals below, as is the case here. See, *e.g.*, *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 595 (2020); *United States v. Haymond*, 139 S. Ct. 2369, 2385 (2019). Only the Ninth Circuit has reached the issue here, making petitioners' theory particularly inappropriate for this Court's review, given the absence of any circuit conflict or any meaningful consideration by other appellate courts. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009).

3. Petitioners' contention that broad appellate review does not apply to removal petitions based on "a bad-faith or frivolous argument for federal-officer or civil-rights removal," Pet. Br. 36, provides further reason for this Court to decline petitioners' invitation to go beyond the Question Presented. If petitioners are correct, respondent would be entitled on remand to show that petitioners' federal-officer theory was bad-faith or frivolous. See Pet. App. 70a–71a (referring to "attenuated" federal-officer claim); *id.* 90a (denying stay pending appeal because federal-officer removal claim does not "raise[] a complex, serious legal question"); *Cty. of San Mateo v. Chevron Corp.,* 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018) (rejecting defendants' "dubious assertion of federal officer removal"), *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020).

Accordingly, petitioners' arising-under argument comes before this Court in the first instance, and the Court should decline to address it. See *Expressions*

Hair Design v. Schneiderman, 137 S. Ct. 1144, 1151 (2017) ("We are a court of review, not of first view." (cleaned up)).

B. Petitioners Mischaracterize Respondent's State-Law Claims and Federal Law.

Petitioners unfairly and inaccurately describe respondent's state-law claims, the law pertaining to arising-under jurisdiction and the scope of federal common law, and the reasons why every court that has considered that jurisdictional argument in this and related cases has rejected it. Far from requiring this Court to "break little new ground," Pet. Br. 37, petitioners' assertions ignore the allegations in respondent's complaint, conflict with decades of settled precedent governing the creation of new federal common law, and seek an unprecedented application of the "complete preemption" doctrine to complaints that plead state-law claims only.

1. Petitioners' arising-under arguments rest on the thrice-flawed assertion that respondent's state-law claims "seek[] redress for interstate pollution" caused by "the combustion of petitioners' fossil-fuel products," actually assert a federal common law claim in the guise of Maryland state-law tort claims, and justify removal under 28 U.S.C. 1331. Pet. Br. at 38–45.

Respondent's complaint asserts tort claims under Maryland law, including public and private nuisance and failure to warn. J.A. 28–29. "Interstate pollution" is not the wrongful conduct challenged in these claims, and respondent does not seek a court order limiting greenhouse gas emissions. See Pet. App. 21a–22a ("references to fossil fuel production in the Complaint . . . [are] not the source of tort liability."); *San Mateo*, 960 F.3d at 601–03; *Boulder*, 965 F.3d at

819–27; *Rhode Island*, 979 F.3d at 59–60; *Oakland,* 969 F.3d at 907. For this threshold reason, petitioners' contention that respondent's claims are "necessarily and exclusively governed" by a body of federal common law that regulates disputes over "interstate pollution," Pet. Br. at 9, fails.

Moreover, the Court would need to create a new category of federal common law to encompass the state common law tort claims at issue, a sweeping act of judicial lawmaking that could not be reconciled with the Court's admonition that "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 718 (2020).

2. Petitioners' reliance on the federal common law of interstate emissions independently fails because *that* federal common law has been displaced by the Clean Air Act ("CAA"). See *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423–25 (2011) ("*AEP*") (CAA displaces federal common law public nuisance claims challenging defendants' greenhouse gas emissions); *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). As the Court held in *AEP*, whatever federal common law might once have applied to disputes over interstate emissions no longer exists, and cannot provide a basis for jurisdiction. See 564 U.S. at 429 ("[T]he availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal [CAA]."); see also *Oakland*, 969 F.3d at 906.

3. Petitioners' jurisdictional arguments also run counter to the century-old "'well-pleaded complaint rule[,]' which provides that federal jurisdiction exists

only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998). As the "master of the claim," respondent had every right to "avoid federal jurisdiction by exclusive reliance on state law" in this case. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Because federal preemption, whether by statute or common law, "is ordinarily a federal defense," *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987), a complaint like respondent's, which does not on its face plead a federal-law defense, does not arise under federal law for purposes of 28 U.S.C. 1331. *Id.*

While the doctrine of "complete preemption" is an exception to the well-pleaded complaint rule, Pet. Br. 41, petitioners expressly disavowed below any complete preemption argument based in federal common law. *See* Defendants' Fourth Cir. Reply Br. at 10 ("Defendants did not make a complete-preemption argument as to federal common law." (cleaned up)); *Wood v. Milyard*, 566 U.S. 463, 474 (2012) (standards governing waiver). The Court has repeatedly expressed great "reluctan[ce] to find th[e] extraordinary preemptive power" required for complete preemption, *Metro. Life Ins. Co.*, 481 U.S. at 65, and has only applied the doctrine to three statutes,[5] which "convert[] an ordinary state common-law complaint into one stating a federal claim" for removal purposes, *Caterpillar*, 482 U.S. at 393; see *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). The Court has never found federal common law, let alone *displaced* federal common law, completely preemptive.

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[5] Section 301 of the Labor Management Relations Act, 29 U.S.C. 185; Section 502(a) of ERISA, 29 U.S.C. 1132(a); and the National Bank Act, 12 U.S.C. 85, 86.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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