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 FOR STATES OF NEW YORK, RHODE ISLAND, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Section 1447(d) of Title 28 of the *United States Code* reads: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise." Section 1442 concerns removal of cases against federal officers. Section 1443 concerns removal of certain cases implicating civil rights.

When a defendant has removed a case to federal court based on multiple grounds that include federal-officer jurisdiction (28 U.S.C. § 1442) or civil-rights jurisdiction (28 U.S.C. § 1443), and the district court remands the case to state court, eight courts of appeals (including the Fourth Circuit in this case) have held that § 1447(d) authorizes appellate review only of the district court's rejection of the federal-officer or civil-rights grounds for removal. One court of appeals has held that § 1447(d) authorizes review of each and every ground for removal addressed by the district court, including grounds that would not be reviewable on appeal standing alone.

The question presented is:

Whether 28 U.S.C. § 1447(d) authorizes a court of appeals to review a remanding court's rejection of each and every ground asserted for removal, when removal was premised in part on either federal-officer jurisdiction (28 U.S.C. § 1442) or civil-rights jurisdiction (28 U.S.C. § 1443).

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INTEREST OF THE AMICI STATES

Congress enacted the general statutory prohibition against appeals of remand orders in 28 U.S.C. § 1447(d) to prevent undue federal judicial interference with state-court proceedings and state-law enforcement. It thus authorized appellate review of remand orders only when the district court was rejecting one of two grounds for removal that implicate particularly sensitive issues of federal-state relations: suits against federal officers, or suits against persons unable to enforce in state court the laws providing for equal civil rights. To ensure that these exceptions remain appropriately cabined, every court of appeals but one that has considered the issue has held that an appeal from a remand order is limited to the question of whether the district court properly rejected one of the two grounds for removal that are expressly exempted from the no-appeal rule.

This carefully circumscribed right of appeal reflects the foundational presumption that state courts are fully competent to adjudicate disputes, that state-court litigation should not be diverted to the federal courts at all except in narrowly defined circumstances, and that federal appellate review of remand orders should be even more limited. But petitioners ask this Court to interpret § 1447(d)'s two narrow exceptions to the no-appeal rule in a way that would create a major loophole in the rule and severely undermine important federalism principles.

Amici States of New York, Rhode Island, California, Connecticut, Delaware, Hawai'i, Illinois, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Vermont, Virginia, Washington, and the District of

Columbia have a compelling interest in protecting the ability of all States to enforce their own laws in their own courts. That state interest is implicated here because petitioners' argument, if accepted, would permit defendants to engage in artful pleading to obtain federal appellate review of every aspect of every remand decision, thereby prolonging federal litigation over threshold removal issues, improperly delaying state-court proceedings by months or even years, and upsetting the careful balance established by Congress between state and federal courts.

As respondent has persuasively argued, Congress enacted § 1447(d) to restrict the jurisdiction of the federal courts, and to guard against removal's inherent interference with States' authority by ensuring the prompt return of matters to state court once a federal district court has found no basis for removal. Petitioners, by contrast, would construe the statute to permit appellate review of any ground for removal rejected by a district court, so long as the request for removal invoked as well a federal-officer or civil-rights basis. Such an interpretation of the statute, if adopted by this Court, would provide a road map for the complete evisceration of the no-appeal rule: a party could ensure appellate review of every possible claim for removal simply by adding federal-officer or civil-rights grounds, however tenuous, to a notice of removal. Such a reading of the statute would impede state-court litigation in precisely the manner Congress intended to prohibit, and would undermine the States' efforts to enforce their own laws in their own courts.

In short, petitioners ask this Court to transform an exception clause that Congress created to ensure appellate scrutiny of potentially *meritorious* assertions of § 1442 and § 1443 removal into a statute that would

open appellate review to all other grounds listed for removal despite *meritless* assertions of § 1442 or § 1443 removal. This Court should decline petitioners' invitation to expand the exceptions in § 1447(d) beyond the two that are explicitly recognized.

STATEMENT OF THE CASE

1. In 1887, Congress enacted the earliest version of what is now 28 U.S.C. § 1447(d). Congress provided that, whenever a case is removed from state court to a federal district court and then remanded, "such remand shall be immediately carried into execution, and no appeal or writ of error from the decision . . . so remanding such cause shall be allowed." Act of Mar. 3, 1887, Ch. 373, § 2, 24 Stat. 552, 553. This Court confirmed that Congress's purpose was to make the district court's remand order "final and conclusive" and "to contract the jurisdiction of the federal courts." *Ex parte Pennsylvania Co.*, 137 U.S. 451, 454 (1890). Indeed, this Court held that the appellate bar was so absolute that even certiorari review by this Court was unavailable to resolve a circuit split in a case where the bar applied, because "Congress alone" had authority to expand appellate jurisdiction over removal orders. *In re Matthew Addy S.S. & Commerce Corp.*, 256 U.S. 417, 420 (1921); *see also Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976) (§ 1447 was created to bar all review of remand orders "whether erroneous or not"). By denying any form of appellate review of remand orders, Congress established a rule to bar the interruption of "the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause [had been] removed." *United States v. Rice*, 327 U.S. 742, 751 (1946).

In 1949, when Congress reorganized Title 28, it preserved the same appellate bar by enacting § 1447(d), which provided in full: "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. A contemporaneous report from the House Judiciary Committee noted that the purpose of adding the subsection was "to remove any doubt that the former law as to the finality of an order of remand to a State court is continued." H.R. Rep. No. 81-352, at 15 (1949).

Since 1949, Congress has added just two exceptions to the statutory bar on appeals of remand orders. First, in the Civil Rights Act of 1964, Congress added the following text to the end of § 1447(d): "except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise." Section 1443 authorizes removal of certain "civil actions or criminal prosecutions, commenced in a State court," when such proceedings are brought against a person "who is denied or cannot enforce" in state court "a right under any law providing for the equal civil rights of citizens of the United States," or when they concern "any act under color of authority derived from any law providing for equal rights." 28 U.S.C. § 1443.

Second, in the Removal Clarification Act of 2011, Congress allowed for appeals of remand orders under 28 U.S.C. § 1442. That statute authorizes removal of certain state-court actions brought against federal officers or agencies.

2. This Court has long recognized that § 1447(d) establishes a policy of "avoiding prolonged litigation on threshold nonmerits questions" and promptly returning matters to state court once a federal district court has determined that there is no basis for removal. *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 237 (2007). Consistent with that principle, nearly every circuit to consider the question has narrowly construed the scope of appeals under § 1447(d)'s exceptions to nonappealability. Because appellate jurisdiction extends only to remand orders under either § 1442 (federal-officer removal) or § 1443 (civil-rights removal), the courts have consistently held that the only question presented on appeal is whether removal on these two enumerated grounds was proper. *See Rhode Island v. Shell Oil Prods. Co.*, 979 F.3d 50, 58-59 (1st Cir. 2020); *Board of Cty. Comm'rs v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 802 (10th Cir. 2020); *County of San Mateo v. Chevron Corp.*, 960 F.3d 586, 595-96 (9th Cir. 2020); *Mayor of Baltimore v. BP p.l.c.*, 952 F.3d 452, 459 (4th Cir. 2020) (decision below); *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012). These courts have specifically rejected litigants' attempts to raise on appeal other grounds for federal removal.

Only the Seventh Circuit has held otherwise. That court concluded that a defendant who has removed a case to federal court under § 1442 or § 1443 as well as other grounds may raise *any* arguments for removal on appeal from the remand order—even when those grounds for remand would not by themselves be sufficient to confer appellate jurisdiction. *See Lu Junhong v. Boeing Co.*, 792 F.3d 805, 810-13 (7th Cir. 2015).

SUMMARY OF THE ARGUMENT

I.A. Section 1447(d) reflects Congress's choice to respect federalism by prioritizing the sovereignty of States and the autonomy of state courts over the availability of federal appellate review over remand orders. The history of § 1447(d) reflects that Congress has consistently chosen to require immediate remand of cases to state courts rather than allow appellate review of the remand order, despite several occasions on which Congress could have made, or was urged to make, a different choice.

B. The plain text of § 1447(d) implements this background principle by providing that the only question a court of appeals may review on appeal from a remand order is whether the district court erred in rejecting a claim for removal under § 1442 or § 1443. Because the statute's main clause prohibits all appeals of remand orders, the secondary clause containing the exceptions must be read narrowly to preserve the effect of the main clause.

II.A. The States' experiences with defendants' removal practices demonstrate the disruption to state sovereignty created by petitioners' reading of § 1447(d). States bring a wide variety of enforcement proceedings under their own laws in their own courts, including financial regulation, drug enforcement, environmental protection, and more. A common tactic of defendants is to remove these enforcement actions to federal court, no matter how tenuous the basis for removal, in order to delay the state-court proceedings and any resulting adverse judgments. If § 1447(d) were reinterpreted to allow appellate review of all grounds for removal, defendants would have a powerful new tool to further prolong federal litigation over threshold

removal issues and thus impede the States' efforts to obtain relief for serious wrongdoing.

B. Such delays have been particularly disruptive in lawsuits brought by States and localities to address fraud and other misconduct by fossil-fuel companies. Like Baltimore in this case, States have sought to enforce their own laws by bringing lawsuits under state law in state courts against fossil-fuel companies for their decades-long campaigns to conceal their knowledge of climate change and the central role their products play in causing climate change. As the Fourth Circuit and other courts have rightly concluded, there is no serious claim that these cases involve federal officers or civil rights in a way that would warrant removal under § 1442 or § 1443; indeed, petitioners do not even attempt to make such an argument to this Court. Nonetheless, state-court defendants like petitioners have leveraged their meritless invocations of § 1442 or § 1443 removal to confer reviewability on other removal grounds for which Congress never contemplated appellate review.

III. Because Congress did not authorize the courts of appeals to review any bases for removal other than those under § 1442 and § 1443, this Court should decline to review petitioners' claims that the case was removable under the general removal statute, 28 U.S.C. § 1441. In any event, petitioners' § 1441 argument is meritless. Petitioners invoke the complete-preemption doctrine to assert that Baltimore's state-law claims necessarily arise under federal law because they implicate interstate air pollution. But this Court has already said that the Clean Air Act displaces federal common law in this context, *see American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423-25 (2011), and petitioners have conspicuously failed to identify

any provision of the Clean Air Act that would preclude Baltimore's state-law claims here.

ARGUMENT

I. Congress's Strict Limitation on Appellate Review of Remand Orders Protects Important Federalism Principles.

A core reserved power of the States under the Constitution is their sovereign prerogative to maintain "state judicial systems for the decision of legal controversies." *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 285 (1970). Because removal of state-law claims to federal courts necessarily interferes with that sovereign interest, this Court has long held that "'[d]ue regard for the rightful independence of state governments'" demands that removal statutes "be strictly construed." *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)). Petitioners denigrate the States' sovereign powers and disregard these important federalism concerns in urging this Court to endorse expansive appellate review that goes beyond the limits of § 1447(d).

A. In Enacting 28 U.S.C. § 1447(d), Congress Reinforced States' Sovereign Power and Restricted Federal Appellate Jurisdiction Over Remand Orders.

Section 1447(d) promotes the independence of state courts—not just judicial economy within the federal courts, as the States supporting petitioners propose (*see* Br. for Amici Curiae Indiana et al. 11 ("Indiana Amicus Br."); *see also* Pet'r Br. 37). The removal juris-

diction of federal courts has always been strictly construed out of respect for the "power reserved to the states under the Constitution to provide for the determination of controversies in their courts." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). The judicial power reserved to the States by the Constitution to decide controversies regarding state laws in state courts "may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution." *Id.* at 109. Because § 1447(d) expresses the historic respect that Congress has for the independence of state courts, the exception established for appellate review must be read with this traditional constraint in mind.

In contrast to the plenary role of state courts, "federal courts are courts of limited jurisdiction," and the Constitution constrains the lower federal courts to exercise only the jurisdiction specifically conferred on them by statute. *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019) (quotation marks omitted). Indeed, the Constitution does not require Congress to confer general federal-question jurisdiction on the federal courts, and Congress chose not to do so until the 1870s. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997). The presence of important federal issues in a case thus has never been enough, by itself, to demand a federal forum, because the Constitution contemplates the availability of this Court's review of final judgments from both state and federal courts as the mechanism to ensure consistent application of federal law. *See id.*

Adhering to this principle in the removal context, this Court has recognized that removal is permissible only when "Congress has clearly extended the reach of

the statute." *Home Depot*, 139 S. Ct. at 1749. This principle applies not just to removal itself, but to appeals of remand orders finding removal improper. Upon such a finding, a state court is entitled to promptly resume adjudication of the claims that had originally been brought before it. *See* 28 U.S.C. § 1447(c) (case "shall be remanded" when "at any time" it becomes apparent that federal jurisdiction is lacking). Broader appellate review of such remand orders delays state-court review and thus prevent the States from resuming the exercise of their sovereign prerogative to adjudicate state-law claims. And Congress intended to promptly return such matters to state court even when the federal district court may have incorrectly denied removal. (*Cf.* Indiana Amicus Br. 5, 16 (contending that claims arose under federal law).) "[O]ur precedents make abundantly clear that § 1447(d)'s appellate-review bar applies with full force to erroneous remand orders." *Osborn v. Haley*, 549 U.S. 225, 265 (2007) (Scalia, J., dissenting). "Determination of an order's lawfulness can only be made upon review—and it is precisely review that § 1447(d) forbids." *Id.* (Scalia, J., dissenting).

Congress has long been aware of the various policy arguments in favor of expanded appellate review but has chosen to create only specific, narrowly drawn exceptions to the no-appeal rule. Those exceptions do not support petitioners' broad theory of the scope of appellate review under § 1447(d) because Congress enacted them for narrow purposes that are irrelevant to petitioners' position here. In 1964, Congress added the provision allowing appeals of civil-rights removal claims as part of a landmark law to provide an important check against remands to state courts where a party's civil rights may not be protected. 110 Cong. Rec. 6,739 (Apr. 6, 1964) (statement of Senator Thomas

Dodd). Congress was well aware of the objection that such appeals would interfere with the independence of state courts and delay state judicial proceedings. *See, e.g.*, *id.* at 7,551 (Apr. 13, 1964) (statement of Senator George Smathers) ("Thus the jurisdiction of the State courts—in these cases alone—could be nullified for months by the simple filing of a petition to remove, followed by an adverse order of the U.S. district court, even though followed by an adverse judgment of the U.S. court of appeals upon the appeal."). Congress resolved those concerns by limiting appeals to those cases where civil-rights concerns were directly presented, and where Congress had explicitly determined that the federal interest in protecting those rights outweighed the substantial concerns about interference with state sovereignty. But when a district court has correctly rejected a claimed civil-rights predicate for removal, there is no similar interest in appellate review of the district court's rejection of additional, unrelated grounds for removal.

When Congress amended § 1447(d) for the second and final time in the Removal Clarification Act of 2011, it once again did so with a specific and targeted purpose: to extend the protection of appellate review to federal officers sued or prosecuted in state courts. Congress allowed appeals specifically to circumscribe the proliferation of pre-suit discovery proceedings against federal officers in state courts—including proceedings against sitting members of Congress. *See* H.R. Rep. No. 112-17, at 3-4 (2011). The federal interest it sought to vindicate was the federal government's unique and "indefeasible power to hold a Federal officer or agent criminally or civilly liable for an act allegedly performed in the execution of their Federal duties." *See id.* at 3. Congress explained that federal

officers "should not be forced to answer for conduct asserted within their Federal duties in a state forum that invites 'local interests or prejudice' to color outcomes." *Id.* The 2011 amendment to § 1447(d), like the 1964 amendment, thus addressed a specific situation in which the federal government's interest in retaining jurisdiction in the federal courts was uniquely strong—and sufficiently so to overcome the powerful arguments in favor of returning jurisdiction promptly to state courts upon a finding that removal was improper. And again, when a district court has correctly rejected the claimed federal-officer ground for removal, there is no similar interest in appellate review of the district court's rejection of other unrelated grounds for removal.

Petitioners' argument here wrenches the exceptions in § 1447(d) from their context. According to petitioners, so long as a state-court defendant identifies § 1442 or § 1443 as a basis for removal—no matter how tenuous that claim—that defendant is then entitled to raise on appeal *any* ground for removal, even when the case indisputably lacks the unique federal interests implicated by § 1442 and § 1443. Such an interpretation of § 1447(d) is divorced from foundational principles of federalism and disregards Congress's careful efforts to respect and preserve each sovereign's unique powers and prerogatives. Congress had strong reasons for providing appellate review of remand determinations rejecting federal-officer or civil-rights removal; its goal was to reinforce those particular grounds for removal where those specific federal interests exist. But Congress had no reason to make the *meritless* assertion of such grounds for removal into a free ticket for review of all other grounds for removal, and it did not do so in § 1447(d). While Congress, like this Court, has long been "well aware"

of various policy arguments that § 1447(d)'s bar on appellate review sometimes has "undesirable consequences," that "policy debate . . . belongs in the halls of Congress, not in the hearing room of this Court." *Powerex Corp.*, 551 U.S. at 237.

B. The Plain Text of § 1447(d) Permits a Court of Appeals to Review Only the Two Grounds for Removal Enumerated in the Subsection.

The plain text of § 1447(d) forecloses petitioners' arguments. Nearly every circuit to consider the question presented in this case has held that § 1447(d)'s exception clause should be read narrowly to be consistent with the core purpose of that statute: to prohibit review of remand orders. Petitioners purport to rely on a plain-text reading (Br. 16), yet they ignore the primary prohibition of § 1447(d). Petitioners' argument implausibly transforms a statute that by its very nature and through its limited exceptions safeguards the reserved sovereign power of the States into a broad, federal-jurisdiction-granting provision.

"[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). In the case of a statute like § 1447(d) that contains a main rule and exceptions, a contextual reading means that this Court will "usually read the exception[s] narrowly in order to preserve the primary operation of the provision." *See Commissioner of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989); *see also A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process

and to frustrate the announced will of the people."). "Few statutes read more clearly" than § 1447(d)'s main clause, which contains a comprehensive bar on appellate review of remand orders. *Osborn*, 549 U.S. at 262-63 (Scalia, J, dissenting). That appellate bar remains § 1447(d)'s main function, and an appropriately contextual reading of the two explicitly defined exceptions requires them to be construed narrowly to avoid undermining § 1447(d)'s principal command.

The contrary interpretation by petitioners and their amici (Pet'r Br. 16-18; Indiana Amicus Br. 6-10) rely on their overreading of the word "order" in the exception clause. Petitioners argue that every part of "an order remanding a case to the State court" is reviewable on appeal if, as a matter of procedural history, the state-court defendant had merely cited "the federal-officer or civil-rights removal statutes" in its notice of removal (Pet'r Br. 11)—no matter how tenuous those grounds for removal might be, and even when, as here, the defendant has abandoned those grounds for removal on appeal. But that argument subverts the interpretive principle that a statute's main purpose takes priority over its exceptions by allowing Congress's narrow exceptions to the no-appeal rule to swallow § 1447(d)'s appeal bar.

The amici States supporting petitioners attempt to bolster this argument by relying on *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996), which construed 28 U.S.C. § 1292(b). Indiana Amicus Br. 11-12. But § 1292(b) is starkly different from § 1447(d) in ways that preclude the superficial conflation of their texts proposed by the petitioners' amici States. Section 1292(b) governs interlocutory appeals in cases where a matter unquestionably is being litigated in federal court and there is no competing state

court from which the case has temporarily been removed. *See Yamaha Motor*, 516 U.S. at 205. Section 1292(b) thus does not implicate the federalism values that lie at the heart of § 1447(d) because the sole effect of the statute is to regulate when the federal court of appeals may review matters still pending in the federal district courts. By contrast, a broad reading of § 1447(d) necessarily expands federal judicial review at the expense of state sovereignty by delaying the prompt return of a legal dispute to the state court where it originated—a categorically different harm, which implicates interests deeper than mere judicial economy.

The same conclusion follows from comparing the texts of the two statutory provisions. Section 1292(b) is at its core a provision that *creates* a right to appeal. It is preceded by a subsection stating that "the courts of appeals *shall* have jurisdiction of appeals" from specific types of interlocutory orders. 28 U.S.C. § 1292(a) (emphasis added). And subsection (b) then further authorizes interlocutory appeal of certain orders that "involve[] a controlling question of law" worthy of immediate review. *Id.* § 1292(b). By contrast, § 1447(d) is at its core a provision that *prohibits* appeals. It provides by default that a remand order "is not reviewable on appeal or otherwise," and only thereafter provides exceptions to that general rule. Those exceptions, moreover, are enumerated by subject matters that, as discussed, related to specific unique federal interests. As the Fourth Circuit thus correctly held below, there is no basis to read the word "order" in § 1447(d) identically to the same word in § 1292(b), given the two statutes' fundamentally different purposes and context. *Mayor of Baltimore*, 952 F.3d at 460; *see also Environmental Def. v. Duke Energy Corp.*,

549 U.S. 561, 574 (2007) ("A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.").

Petitioners' argument, if followed to its logical conclusion, would upend the balance of power between state and federal courts. As respondent points out (Resp. Br. 11-12), if petitioners were correct that review of an "order" in § 1447(d) must mean review of every issue decided by that order, then it would follow that review of a "judgment" likewise entails review of every issue decided by that judgment. On that reasoning, when this Court reviews a final judgment of a state court of last resort, this Court should review all issues decided in that judgment, including not only federal questions of law presented by the case but any state-law questions as well. *See* 28 U.S.C. § 1257 (conferring jurisdiction on this Court to review "[f]inal judgments or decrees" of state high courts whenever "the validity of a treaty or statute of the United States is drawn in question"). But this Court has never claimed that power. *See Animal Science Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1874 (2018); *Murdock v. City of Memphis*, 87 U.S. 590, 627-28 (1874). Respect for federalism demands a narrower construction of both statutes, restricting review to the grounds specified in the statutory text.

II. Expanding the Scope of Review Authorized by § 1447(d) Would Frustrate State Law Enforcement and Unduly Burden the States.

Petitioners' incorrect interpretation of § 1447(d), if adopted, would interfere with the States' prerogative to enforce their laws in state courts. "[C]onsiderations of comity make us reluctant to snatch cases which a

State has brought from the courts of that State, unless some clear rule demands it." *Franchise Tax Bd. v. Construction Laborers Vacation Trust for So. Cal.*, 463 U.S. 1, 21 n.22 (1983). Petitioners' interpretation would allow defendants to obstruct state law enforcement in a variety of matters. And such obstruction has imposed serious costs on the States, and unacceptable delays in the States' abilities to obtain relief for their respective citizens and to protect their sovereign and quasi-sovereign interests. Litigation over removal consumes resources; unduly burdens federal courts; risks prolonged disputes over threshold jurisdictional issues; defers adjudication on the merits of defendants' liability; and delays a sovereign State's resolution of their state-law matters.

These harms would be magnified if this Court were to agree with petitioners here and vastly expand appellate review of remand orders. Such a holding would encourage all defendants seeking removal to invoke federal-officer or civil-rights jurisdiction, however tenuous such a claim might be, in order to ensure the appellate reviewability of other, unrelated grounds for removal. And such reviewability would significantly raise the risk of delay by increasing the work of both the courts of appeals and the States, which would have to consider and argue a whole host of potentially complex removal issues on appeal rather than the limited removal grounds that Congress authorized the federal courts of appeals to consider. That result is flatly inconsistent with Congress's express intent to generally prohibit appellate jurisdiction over remands in order to promptly return jurisdiction of state-law claims to the state courts where they originated.

A. Adopting Petitioners' Interpretation Would Embolden Defendants to Frustrate State Law Enforcement Through Improper Removals.

States routinely seek to enforce their own statutes and common law in state courts. Such enforcement actions may involve claims that affect national interests or implicate federal law, but those factors present no impediment to state-court jurisdiction. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392-93 (1987). To the contrary, "state courts have inherent authority, and are thus presumptively competent, to adjudicate" such claims, consistent with the long-standing principle that "the States possess sovereignty concurrent with that of the Federal Government." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Arguments alleging that state plaintiffs are wrongly attempting to influence national policy, or that "[s]tate courts have no business deciding" issues with national import (Indiana Amicus Br. 24), improperly denigrate our system of dual sovereignty. *See Trainor v. Hernandez*, 431 U.S. 434, 445 (1977). "A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism." *Idaho*, 521 U.S. at 275.

By contrast, undue federal "interference with a state judicial proceeding prevents the state . . . from effectuating its substantive policies," *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975). It also undermines the functionality of the well-pleaded complaint rule, which allows a State as plaintiff to choose its own claims and its own forum. *See Caterpillar, Inc.*, 482 U.S. at 392. In recent years, an increasingly common tactic for defendants facing state-law enforcement actions in state court is to remove the matter to federal court based on tenuous reasoning, thus miring these

cases in prolonged jurisdictional litigation and, when the plaintiff is a State, frustrating the State's role as enforcer of its laws. For example:

• State enforcement actions were critical to revealing the scope of the subprime mortgage lending practices that contributed to the global 2008 financial crisis. In a representative case, Massachusetts brought an action in its state courts alleging unfair or deceptive practices under the Massachusetts Consumer Protection Act. The defendant bank sought unsuccessfully to remove the case to federal court on the grounds that a cease-and-desist order from the Federal Deposit Insurance Corporation limited the relief available to the State. *See Massachusetts v. Fremont Inv. & Loan*, No. 07-cv-11965, 2007 WL 4571162 (D. Mass. Dec. 26, 2007).

• States have relied on their own laws regarding controlled substances to combat the ongoing prescription drug abuse crisis. West Virginia brought one such action against a pharmaceutical company in state court, alleging that the State had been forced to expend substantial amounts of money to deal with the consequences of the company's practices regarding their highly addictive drugs. Although the claims were based on West Virginia's consumer protection, deceptive practices, unjust enrichment, and controlled substances laws, the defendant company tried unsuccessfully to remove the action to federal court on the grounds that West Virginia's state law claims made numerous references to the defendants' violation of federal law. *See West Virginia ex rel. Morrisey v. McKesson Corp.*, No. 16-cv-1772, 2017 WL 357307 (S.D. W. Va. Jan. 24, 2017).

• State enforcement actions are essential to protect consumers from faulty products and services in a wide array of industries. In one group of cases consolidated after removal, twelve States sued Volkswagen in their respective state courts for using "defeat devices" to evade Environmental Protection Agency (EPA) emissions test procedures. Volkswagen unsuccessfully sought removal of all of the cases on the grounds that the concept of a "defeat device" was defined by federal law and that the cases would require the court to construe EPA emission regulations. In granting the States' motions to remand, the district court noted that proving an emissions violation was not an element of any State's claim; instead, the cases were about whether Volkswagen had deceived consumers about the characteristics of their cars. *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, MDL No. 2672, 2017 WL 2258757 (N.D. Cal. May 23, 2017).

• States have taken action to prevent the deceptive and misleading practices that lead to the sale of tobacco products, such as e-cigarettes, to minors. North Carolina brought such a case in its state court based on its deceptive practices law and age-verification law. The defendant unsuccessfully claimed that the State's cause of action was completely subsumed by the Family Smoking Prevention and Tobacco Control Act. *See North Carolina ex rel. Stein v. Tinted Brew Liquid Co.*, No. 19-cv-886, 2019 WL 5839184 (M.D.N.C. Nov. 7, 2019).

• States have sued to protect their residents from unfair practices by communications providers, many of whom are also federally regulated. New York sued Internet service providers for promising customers reliable service and Internet speeds that the providers

knew they would not be able to deliver. New York relied on state-law claims for fraud, deceptive business practices, and false advertising. The defendants unsuccessfully sought removal on the grounds that the case necessarily raised a federal question about the application of Federal Communications Commission regulations. *See New York v. Charter Commc'ns, Inc.*, No. 17-cv-1428, 2017 WL 1755958 (S.D.N.Y. Apr. 27, 2017).

• States have sued to protect their residents from the effect of harmful environmental contamination. The States of Washington and Oregon each filed complaints in their respective state courts alleging that Monsanto Company produced products containing polychlorinated biphenyls (PCBs) that contaminated water, land, and wildlife—and that Monsanto intentionally concealed the toxicity of PCBs. Monsanto unsuccessfully attempted to remove the lawsuits to federal court under § 1442 on the grounds that the federal government bought and directed the production of some PCBs. The cases were remanded because the federal government had merely purchased a product off the shelf and had not directed Monsanto to conceal the toxicity of PCBs. *See Washington v. Monsanto Co.*, 274 F. Supp. 3d 1125 (W.D. Wash. 2017), *aff'd*, 738 F. App'x 554 (9th Cir. 2018); *Oregon v. Monsanto Co.*, No. 18-cv-238, Tr. at 56-62 (D. Ore. July 19, 2018), ECF No. 57.

Absent a properly confined interpretation of § 1447(d), there are few adequate safeguards that federal courts could use in a consistent and uniform way to prevent a party from simply citing § 1442 or § 1443 in its notice of removal and thus opening the door to appellate review of every ground for removal. Petitioners dismiss concerns about delay by arguing that federal courts will prevent dilatory tactics by

requiring defendants to pay the States' attorneys' fees for improper removal. *See* Pet'r Br. 35-36; *see also Lu Junhong*, 792 F.3d at 813. But fees under § 1447(c) are available only if the defendant had no objectively reasonable basis for removal, *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 141 (2005)—a very high threshold that is difficult to establish, particularly in the case of a well-counseled defendant; moreover, district courts often deny fees so long as a single asserted ground for removal is a close question, even if other asserted grounds are unreasonable, *see, e.g., In re Volkswagen*, 2017 WL 2258757, at *13. The prospect of fees thus cannot meaningfully deter defendants from asserting marginal claims for removal in order to invoke reviewability under § 1447(d), nor would it protect the States from the delays and expenditure of resources that are endemic to adjudication of such claims.

More fundamentally, petitioners' argument ignores the fact that fees under § 1447(c) (or sanctions under any other provision of law) are an *independent* procedural safeguard—not a replacement for § 1447(d)'s general prohibition on appeals from remand orders. That prohibition reflects Congress's careful balancing of the federal interest in providing a federal forum to state-court defendants under appropriate circumstances, and the compelling state interest in returning such matters promptly to state court when a federal district court has determined that a defendant has failed to satisfy the narrow grounds for federal removal. Congress wrote § 1447(d) to require actual immediate remand, not merely a monetary fee for delay that a deep-pocketed defendant may treat as a cost of doing business.

The Seventh Circuit—the only circuit to have endorsed a position like the one petitioners press

here—also understated the consequences of an approach that would allow defendants to proliferate the issues on appeal from removal orders, mistakenly stating that there is little cost to allowing *every* issue to be appealed if a *single* issue is on appeal. As the Tenth Circuit rightly observed in rejecting the Seventh Circuit's approach, a circuit court may summarily dispose of a weak argument for removal under § 1442 or § 1443, but if circuit courts now must review every argument for removal, "expanding the scope of § 1447(d) review . . . has significant potential to foment protracted litigation of jurisdictional issues . . . and prolong the interference with state jurisdiction that § 1447(d) clearly seeks to minimize." *Board of Cty. Comm'rs*, 965 F.3d at 816 (quotation marks omitted). As respondent notes (*see* Br. 36), the papers the district court reviewed in deciding the eight removal claims in this case included 180 pages of briefing and 1,100 pages of declarations and exhibits. Allowing a defendant to force a court of appeals to review all of that material would completely transform the removal dockets of the circuits.

B. Petitioners and Similar Defendants Have Already Caused Profound Delays to Claims by States and Localities in State Courts Similar to Respondent's Claims Here.

As the foregoing examples show, States regularly enforce their state laws to seek redress in areas with major national and international interests, and courts easily turn aside attempts to remove those cases when a State's claims arise under state law. And just as States have been on the front lines of the opioid crisis,

the financial crisis, and other problems that simultaneously receive federal attention, States and localities have been on the front lines of responding to and addressing the extreme effects of the climate crisis.

Yet the present case and other state and local climate-response cases provide an illustration of exactly how defendants can frustrate state enforcement by litigating removal claims. Petitioners made a token argument for § 1442 removal—on the grounds that one out of the twenty-six defendants sold fossil fuels to the federal government, and that the federal government generally regulates extraction processes. *See Mayor of Baltimore v. BP p.l.c.*, 388 F. Supp. 3d 538, 568-69 (D. Md. 2019). But in this Court, petitioners abandon this ground for removal, instead asking this Court to endorse removal on the distinct and otherwise unreviewable theory that the claims here necessarily arise under federal common law (Pet'r Br. 37-46)—a claim that this Court did not grant certiorari to consider, and that is meritless in any event (see *infra* at 27-29). If this Court were to endorse such a strategy, nothing would prevent defendants in future state enforcement actions from making similarly tenuous claims for § 1442 or § 1443 removal in order to litigate their other removal claims up the federal appellate ladder, delaying the prompt return to state court that § 1447's plain text requires.

Amicus Rhode Island has suffered exactly such delays in its own state-law-based litigation against fossil-fuel companies. In July 2018, Rhode Island filed a complaint in state court explaining how such companies, in the 1960s and 1970s, developed sophisticated, accurate models to predict the consequences of continued use of fossil fuels—but then made a conscious decision in the 1980s and 1990s to sow doubt about the

scientific consensus that defendants' own research supported. *See* Compl. ¶¶ 106-174, *State v. Chevron Corp.*, No. PC-2018-4716 (R.I. Super. Ct. July 2, 2018), *reproduced at Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. July 16, 2018) (No. 1:18-cv-395), ECF No. 7, pgs. 103-139. The companies' approach relied on deceptive and misleading strategies: they published newspaper ads and radio commercials, and they employed research analysts to study the most effective ways of persuading the public that climate change was speculation rather than an accepted consensus. *Id.* ¶ 156, ECF pg. 128. Rhode Island's suit seeks to recover for the injuries caused by this disinformation campaign under exclusively state-law causes of action for failure to warn, design defect, nuisance, and other civil torts. *Id.* ¶¶ 225-315, ECF pgs. 168-193.

As petitioners here did, the defendants in the Rhode Island case argued that Rhode Island's claims concerned conduct that the defendants had performed at the direction of federal officers, and thus removed the case under § 1442 as well as seven other grounds for removal. *See* Notice of Removal by Shell Oil Products Corp., ECF No. 1. Both the district court and the First Circuit rejected the defendants' § 1442 argument, recognizing that no federal officer prompted or oversaw the defendants' misinformation campaign. *See Chevron Corp.*, 393 F. Supp. 3d at 152, *aff'd sub nom. Rhode Island v. Shell Oil Prods. Corp.*, 979 F.3d at 59-60. As the First Circuit accurately put it, the defendants' arguments for removal have "the flavor of federal officer involvement in the oil companies' business, but that mirage only lasts until one remembers what Rhode Island is alleging in its lawsuit." 979 F.3d at 59-60.

The First Circuit appropriately limited its review of the remand order to the defendants' federal-officer removal arguments, and refused to consider defendants' other arguments in favor of removal. *Id.* at 55-59. Even so circumscribed, the First Circuit did not issue its decision until October 2020—more than two years after Rhode Island first filed its complaint in state court. Appellate review would likely become even more prolonged if this Court were to adopt petitioners' broad interpretation of § 1447(d) and allow parties to assert on appeal multiple other grounds for removal that the courts of appeals would then be required to consider and resolve.

Such extensive procedural delays conflict with the statutory scheme that Congress designed to constrain federal appellate jurisdiction over remand orders. These delays defer desperately needed relief. Baltimore, Rhode Island, and similar plaintiffs brought these actions at the time that they did because state and local governments are incurring costs from climate change effects now, and it is appropriate for defendants that engaged in these deliberate deceptions and frauds to share those costs, or at the very least to have a state court determine if the plaintiff has met its burden of proof on the merits. But defendants have been able to delay any reckoning by endlessly litigating threshold removal questions. It should not take three years to determine which court should hear a case—an outcome that the plain language of § 1447 is designed to avoid by requiring most cases to be remanded without appeal.

III. If This Court Were to Review Petitioners' Argument for Removal Based on 28 U.S.C. § 1441, the Court Should Reject That Argument as Meritless.

Because the court of appeals correctly held that it lacked appellate jurisdiction to review grounds for removal based on statutes other than § 1442 or § 1443, this Court should affirm without reaching the arguments for removal under § 1441 presented by petitioners and their amici. If this Court decides to resolve the § 1441 argument now, then it should reject that argument because it is without merit. *See* Pet'r Br. 38. The party seeking removal has the burden of showing that removal is proper. *See* 14C Charles Alan Wright et al., *Federal Practice and Procedure* § 3739 (4th ed. Oct. 2020 update) (Westlaw). Petitioners' assertion that Baltimore's state-law claims here "necessarily arise under federal common law" (Pet'r Br. 37)—and thus could be removed to federal court under the complete-preemption doctrine—do not satisfy this burden.

As an initial matter, petitioners' complete-preemption arguments have no application to Baltimore's state-law claims challenging petitioners' pattern of deceptive conduct. In these claims, Baltimore is seeking to put an end to petitioners' practice of denying and deceiving the public about what the petitioners actually knew about climate science. No part of that claim even raises a federal issue, let alone one that so dominates a field as to support removal under the complete-preemption doctrine. As courts have repeatedly recognized (see *supra* at 19-21), it is a "core exercise of the states' police powers" to protect the people from the "pernicious practices" of deceptive and false advertising, whether in the context of

prescription drugs, Internet speeds, or fossil-fuel products. *Soto v. Bushmaster Firearms Int'l, LLC*, 331 Conn. 53, 66 (2019). Such cases seek to put a halt to fraud and deceit—not to supplant federal regulation. So too here: Baltimore's deception claims do not seek to restrain emissions, but to halt petitioners' "concealment and misrepresentation of [their fossil fuel] products' known dangers—and simultaneous promotion of their unrestrained use," as the court below correctly recognized. *Mayor of Baltimore*, 952 F.3d at 467.

Petitioners and the amici States supporting them likewise fail to show that Baltimore's state-law public nuisance claims necessarily arise under federal law. Petitioners' sole argument relies on the asserted application of federal common law to interstate air pollution. (Pet'r Br. 38-40.) But this Court has already held that the Clean Air Act displaced any such federal common law. *See American Elec. Power*, 564 U.S. at 423-25. And petitioners fail to identify any specific provision of the Clean Air Act that would forbid Baltimore (or any other State or locality) from relying on state laws to address the deceptive behavior that resulted in concrete harms caused by climate change. In sharp contrast, this Court has previously found complete preemption, sufficient to warrant removal, only when the party seeking removal has identified a specific federal statute that displaces parallel state regulation.[1] Petitioners' vague references to the federal

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[1] *See, e.g.*, *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 11 (2003) (holding that 12 U.S.C. § 86's cause of action for usury against a national bank displaces any similar state cause of action); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-67

interests at stake in preventing climate change are not enough under these precedents. "The mere potential" that issues of federal importance—such as "foreign policy implications"—will come up in the course of a case "does not raise the kind of actually disputed, substantial federal issue" required for removal. *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018), *aff'd in part & dismissed in part*, 960 F.3d 586.

Of course, remand would not preclude petitioners here from raising in state court any defenses to Baltimore's state-law claims that may be available to them under federal law. But raising federal preemption defenses to state-law claims does not convert them into federal claims. *See Caterpillar, Inc.*, 482 U.S. at 392-93. And more fundamentally, state courts are fully equipped to address any and all such defenses. "Usually, state courts are left to decide whether state law claims are preempted by federal law under principles of 'express preemption,' 'conflict preemption' or 'field preemption.' And state courts are entirely capable of adjudicating that sort of question." *Id.*

* * *

Federal law entitled petitioners to present to the district court any and all grounds for removal. The district court here carefully considered each of petitioners' many arguments and rejected them in a thorough

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(1987) (holding that 29 U.S.C. § 1132's cause of action for improper processing of a claim for benefits under an employee benefit plan displaces any similar state cause of action); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557, 560-61 (1968) (holding that 29 U.S.C. § 185's cause of action for a violation of contracts between an employer and a union displaces any similar state cause of action).

decision that remanded the matter to state court. Under § 1447(d), petitioners were permitted to ask the court of appeals to review whether the district court had correctly resolved their claim for removal under § 1442, but no other issue. That process—exhaustive district court review and strictly limited court of appeals review—is the process that Congress chose to balance the sovereign interests of the States with state-court defendants' desire for a federal forum. This Court should reject petitioners' attempt to rewrite that process in a way that would ignore § 1447(d)'s plain meaning and undermine the federalism principles that Congress intended this statute to uphold.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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