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

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The plain language of 28 U.S.C. 1447(d) authorizes appellate review of all of a removing defendant's asserted grounds for removal where one of the grounds was the federal-officer or civil-rights removal statute. Section 1447(d) permits review of the "order remanding the case," and a remand "order" necessarily disposes of all of the grounds for removal asserted in the notice of removal. An appeal of such an order thus necessarily entails review of all of the defendant's grounds for removal.

Try as it might, respondent cannot overcome the plain statutory language. Respondent makes various appeals to statutory "context" and "structure," but its argument really rests on what it perceives to be the overall purpose of Section 1447(d). Respondent then attempts to make a

strained textual argument by positing that a case is removed "pursuant to" the federal-officer or civil-rights removal statutes only when the federal-officer or civil-rights ground for removal turns out to be meritorious. But that alternative interpretation is also flawed, and no court has adopted it. Respondent's resort to congressional ratification fares no better, for reasons petitioners have already explained.

Respondent next turns to the case law, but the cases respondent cites do not move the needle. Tellingly, the only examples that offer respondent any modicum of support come from the bygone era when statutory text played second fiddle to perceived statutory purpose. In any event, the plain-text interpretation of Section 1447(d) fully comports with the provision's purposes. When all is said and done, the Court should read Section 1447(d) to mean what it says: a court of appeals has jurisdiction to review all of the asserted grounds for removal when one of those grounds was the federal-officer or civil-rights removal statute.

After resolving that question, the Court should exercise its discretion to consider whether respondent's claims necessarily arise under federal common law and are thus removable. That additional ground for removal is relevant to determining the appropriate disposition after deciding the question presented, and its resolution here is warranted in light of the sheer number of climate-change cases in which that ground for removal is currently being litigated—including several in which petitions for writs of certiorari have recently been filed in this Court. In line with its longstanding precedents, the Court should hold that claims based on the effects of global climate change arise under federal law, not state law. The judgment of the court of appeals should therefore be reversed.

A. A Court Of Appeals May Review Any Ground For Removal Encompassed In A Remand Order Where The Defendant Premised Removal In Part On The Federal-Officer Or Civil-Rights Removal Statutes

1. The Plain Text Of 28 U.S.C. 1447(d) Permits Review Of Any Ground For Removal

a. Respondent contends (Br. 14-19) that the phrase "order remanding a case" in the second clause of Section 1447(d) is best read to mean the district court's *reasoning* rejecting the federal-officer or civil-rights ground for removal. Yet respondent does not dispute that a remand "order" necessarily resolves all of the asserted grounds for removal, or that appellate review of such an order would ordinarily extend to all of those grounds. Indeed, respondent does not even dispute that its reading requires the phrase "order remanding a case" to have different meanings in the first and second clauses of Section 1447(d). Respondent nevertheless argues that statutory "context" and "structure" mandate such an "improbable construction." *Fourth Estate Public Benefit Corp.* v. *Wall-Street.com, LLC*, 139 S. Ct. 881, 889 (2019) (citation omitted). Respondent is mistaken.

i. Respondent contends (Br. 15, 17) that the second clause of Section 1447(d) should be construed narrowly because it is an "exception" to the first clause, which generally prohibits appellate review of remand orders. As a preliminary matter, the first clause could itself be characterized as an exception to the rule that a remand order would ordinarily be appealable under 28 U.S.C. 1291. See U.S. Br. 16. But regardless of which clause is the "exception," courts "normally have no license to give [statutory] exemption[s] anything but a fair reading." *Food Marketing Institute* v. *Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (internal quotation marks and citation omitted). The fairest reading here is the one mandated by the plain

text: that the second clause of Section 1447(d) permits review of the entire remand "order."

To be sure, courts should not "impl[y]" "additional exceptions" to a "general" statutory provision "[w]here Congress explicitly enumerates certain exceptions." *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 616-617 (1980). But the question here is not whether to imply *additional* exceptions; it is how to construe the "exception" that Congress "explicitly enumerate[d]." *Id.* at 616. Nor does the plain-text reading of the second clause of Section 1447(d) "undermine" the first clause in a "substantial way." *Maracich* v. *Spears*, 570 U.S. 48, 60 (2013). It merely permits normal appellate review in the narrow class of cases that Congress has indisputably exempted from the prohibition on appellate review of other remand orders.

ii. Respondent further argues that its interpretation is preferable because the "primary operation" of Section 1447(d) "as a whole" is to limit appellate review of remand orders. Br. 14, 16. That is not a "proper use" of the whole-text canon of construction. Antonin Scalia & Bryan A. Garner, *Reading Law* § 24, at 168 (2012). Instead, that argument rests on what respondent perceives to be Section 1447(d)'s overarching purpose. But "even the most formidable argument" based on statutory purpose cannot "overcome" clear statutory language. *Nichols* v. *United States*, 136 S. Ct. 1113, 1119 (2016). In any event, the plain-text interpretation is wholly consistent with the apparent purposes of Section 1447(d): namely, to reduce the volume of appeals and to avoid delay in remanded cases while protecting the federal interests at issue in federal-officer and civil-rights cases. See Pet. Br. 26-31.

iii. Respondent next contends (Br. 17-18) that the plain-text interpretation of the phrase "order remanding a case" would cause the first clause of Section 1447(d) to preclude appellate review of a fee award under Section

1447(c). That does not necessarily follow. Review of such an award may not constitute impermissible "review[]" of the remand order, 28 U.S.C. 1447(d), because the fee award is collateral to the merits of the order. See, *e.g.*, *Moore* v. *Permanente Medical Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992). That interpretation would be consistent with the broader treatment of fee awards as discrete from merits proceedings. See, *e.g.*, *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988). Even if the plain-text interpretation were to render Section 1447(c) fee awards unreviewable, however, that interpretation is vastly preferable to respondent's, which would unquestionably give the phrase "order remanding a case" different meanings in a single statutory provision.

iv. Invoking general "federalism principles," respondent argues that "respect for the autonomy and authority of state courts" requires a narrower construction of Section 1447(d). Br. 19. But Congress crossed the federalism bridge when it made cases removable from state to federal court; the division of labor among Article III courts in determining removability does not significantly implicate federalism concerns. And because a remand order is not automatically stayed, an appeal will not necessarily delay proceedings in state court. Cf. N.Y. Br. 10.

The primary effect of respondent's interpretation is that cases *erroneously* remanded would remain in state court. But in those cases, Congress has already determined that a federal forum is appropriate. Permitting appellate review in those cases thus preserves the federal-state balance that Congress initially struck in authorizing removal.

v. Finally on this score, respondent contends that the phrase "order remanding a case" in the second clause of Section 1447(d) must refer to the "specific reasons for the remand" because the Court has construed the first clause

as limited to remand orders "based on a ground specified in [Section] 1447(c)." Br. 20 (citation omitted). While not citing the case by name, respondent is describing the holding of *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976)—a decision criticized by several Justices. See, *e.g.*, *Kakarala* v. *Wells Fargo Bank, N.A.*, 136 S. Ct. 1153, 1153 (2016) (Thomas, J., dissenting from the denial of certiorari); *Carlsbad Technology, Inc.* v. *HIF Bio, Inc.*, 556 U.S. 635, 642 (2009) (Stevens, J., concurring); see *ibid.* (Scalia, J., concurring). In any event, *Thermtron* provides respondent with little assistance; respondent cannot prevail unless the phrase "order remanding a case" has a different, narrower meaning in the second clause of Section 1447(d).

b. Respondent next pivots (Br. 23-31) to an alternative interpretation of Section 1447(d) that it has never before articulated (at least in any detail, see Br. 23-24 n.3). Under that interpretation, a case is not "removed pursuant to" the federal-officer or civil-rights removal statutes unless jurisdiction is actually present under one of those statutes. That novel interpretation—which no court of appeals has adopted—is equally flawed.

The second clause of Section 1447(d) provides that "an order remanding a case to the [s]tate court from which it was removed pursuant to [28 U.S.C. 1442 or 1443] shall be reviewable by appeal or otherwise." The preposition "pursuant to" modifies the verb phrase "was removed." And to "remove" a case is to "transfer" it from state to federal court. See *Black's Law Dictionary* 1550 (11th ed. 2019); *Black's Law Dictionary* 1021 (1st ed. 1891); Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 553 (using the word "removed" in the predecessor to Section 1447(d)).

When a defendant's notice of removal asserts that a case is removable based on the elements set forth in either the federal-officer or the civil-rights removal statute, the

defendant has "removed" the case "pursuant to" that statute. The statutory text makes clear that the act of removal is complete before any remand "order" is issued. Section 1447(d) refers to removal in the past tense ("was removed"). Section 1447 is headed "[p]rocedures *after* removal" (emphasis added). Section 1446(a) requires the notice of removal to provide only a "short and plain statement of the grounds for removal." And Section 1446(d) makes clear that the removal becomes "effect[ive]" as soon as the defendant notifies the state court of the filing of the notice of removal.

Because the act of removal occurs before any adjudication of the "merits" of the removing defendant's jurisdictional arguments, it makes little sense to construe the phrase "was removed pursuant to" as requiring the removal to be meritorious. Whether that ground for removal ultimately proves to be a valid basis for federal jurisdiction does not affect the *removal*; it affects whether the case will be *remanded* to state court. To say that a case is "removed pursuant to" the federal-officer or civil-rights removal statutes is merely to say that the defendant asserted one of those statutes as the basis for removal in its notice of removal.

That interpretation is entirely consistent with the ordinary meaning of the preposition "pursuant to"—which is variously defined as "in accordance with or by reason of," *Black's Law Dictionary* 1401 (4th ed. 1951); "according [to]," *Webster's Third New International Dictionary* 1848 (1961); "as authorized by," *Black's Law Dictionary* 1493 (11th ed. 2019); or—as respondent suggests—simply legalese for "under," *ibid.*; see Resp. Br. 26-27 (discussing *Pereira* v. *Sessions*, 138 S. Ct. 2105 (2018)). It is perfectly natural to say, "pursuant to Rule 56, the plaintiff moves for summary judgment," *Black's Law Dictionary* 1493

(11th ed. 2019), even if the motion is denied on the merits. So too here.

This Court's decision in *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624 (2009), proves the point. At issue there was 9 U.S.C. 16, which permits appeal of an order "refusing a stay * * * under [S]ection 3" of the Federal Arbitration Act. The Court rejected the argument that a stay motion was not "under" Section 3 if it lacked merit; the Court instead held that Section 16 "unambiguously makes the underlying merits irrelevant," such that "even utter frivolousness of the underlying request" for a stay would not preclude appellate jurisdiction. 556 U.S. at 628-629.

Respondent's interpretation presents yet another problem. Under respondent's view, in every case and as a matter of law, appellate jurisdiction under Section 1447(d) is coextensive with the merits of the decision being reviewed—namely, federal-officer or civil-rights removal. That is, if the ground for removal is meritorious, the court of appeals would have jurisdiction and must reverse; if the ground lacks merit, the court of appeals would lack jurisdiction and must dismiss the appeal. The court of appeals would therefore lack the ability to *affirm* the remand order (or reverse on an alternative ground, see Pet Br. 31; U.S. Br. 25)—a power ordinarily incidental to appellate review. Cf. 28 U.S.C. 2106.

If Congress had actually intended to achieve that bizarre result, it would have provided not for the remand order to be "reviewable," but rather for it to be "reversed," since that would be the only possible outcome under respondent's improbable reading. Unsurprisingly, no court of appeals has adopted respondent's interpretation; in fact, all of the cases on respondent's side of the circuit conflict affirmed remand orders rejecting the federal-officer or civil-rights ground. See Resp. Br. 32-33.

c. Respondent's final interpretive argument (Br. 31-35) is that Congress ratified its interpretation of Section 1447(d) when it enacted the Removal Clarification Act in 2011. In that act, however, Congress merely added the words "1442 or" to Section 1447(d); it did not affirmatively reenact the entire provision. See Pub. L. No. 112-51, § 2(d), 125 Stat. 546. As the Court has explained, Congress's "failure to act" when making "only isolated amendments" to a statute does not demonstrate "affirmative congressional approval of [a prior judicial] interpretation." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001) (internal quotation marks and citation omitted).

The cases respondent cites (Br. 32, 35) do not prove otherwise. In *Forest Grove School District* v. *T.A.*, 557 U.S. 230, 244 n.11 (2009), Congress had reenacted the relevant statutory language in full. See IDEA Amendments of 1997, Pub. L. No. 105-17, § 101, 111 Stat. 92. In *Texas Department of Housing & Community Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2519-2520 (2015), the Court focused on legislative history specifically showing that Congress had considered the relevant judicial precedent when it amended the statute at issue. And in *Microsoft Corp.* v. *i4i Limited Partnership*, 564 U.S. 91, 113 (2011), the Court declined to weigh competing policy arguments where Congress had repeatedly amended the relevant statute over the course of decades but had "allowed" the Federal Circuit's "correct" interpretation to remain in effect. None of those cases is even remotely on point here.

Respondent contends (Br. 33-34) that, for purposes of its ratification argument, this Court's decisions interpreting similar statutes (Pet. Br. 20-26) cannot overcome the court of appeals decisions interpreting this one. But Congress is "generally presume[d]" to be "knowledgeable about existing law *pertinent* to the legislation it enacts,"

not merely prior interpretations of the *particular statute* being amended. *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988) (emphasis added). And contrary to respondent's suggestion (Br. 34), the Court has indicated that decisions with only conclusory reasoning provide little support for an inference of congressional ratification. See, *e.g.*, *Lightfoot* v. *Cendant Mortgage Corp.*, 137 S. Ct. 553, 563 (2017); *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 351 (2005). Given the concededly conclusory reasoning in the cases on which respondent's ratification argument relies, the argument for congressional ratification here is exceedingly weak.

2. The Plain-Text Interpretation Of Section 1447(d) Is Supported By Precedent From This Court And The Courts Of Appeals

In a phalanx of cases, this Court and the courts of appeals have interpreted statutes permitting appellate review of an "order" to authorize review of the entire "order." Respondent argues that this Court's cases are distinguishable (ignoring the court of appeals cases altogether), see Br. 21-23, and that other of the Court's cases support its interpretation, see Br. 11-14. Respondent errs on both scores.

a. Respondent contends that the cases from this Court cited by petitioners are distinguishable because the statutes at issue authorize interlocutory review of issues that would "eventually be reviewable on appeal from final judgment," whereas petitioner's interpretation of Section 1447(d) would "permit review of issues that are generally unreviewable." Br. 22-23. But interlocutory review is permitted of some orders that cannot be reviewed later (for example, where a district court denies summary judgment). See *Ortiz* v. *Jordan*, 562 U.S. 180, 183-184 (2011). And appellate courts routinely review issues of subject-matter jurisdiction on appeals from final judgments (for

example, where a district court *denies* a motion to remand and the defendant subsequently prevails on the merits). See U.S. Br. 21-22. There is no reason to believe that Congress wanted to insulate those same issues from review in situations where the remand order is appealable. It simply does not follow from the fact that Congress chose to permit review of certain otherwise unreviewable *orders* that Congress simultaneously intended to preclude review of particular *issues* in those orders.

Respondent makes two additional attempts to distinguish this Court's decision in *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199 (1996). *First*, respondent notes that, in 28 U.S.C. 1292(b), Congress paired the word "order" with the verb "involves," showing that the reviewable issues on appeal must be broader than the certified "controlling question of law." See Br. 21-22. *Second*, respondent observes that a court of appeals has discretion under Section 1292(b) to deny review of a certified order, whereas a court of appeals has no similar discretion under Section 1447(d). See Br. 22. The problem for respondent, however, is that the Court did not rely on either of those features in *Yamaha*; instead, the Court based its decision on Congress's use of the word "order," which signified that appellate review extends to "any issues fairly included" in the order. 516 U.S. at 205. And of course, neither of those asserted distinctions applies to the other cases from this Court that petitioners cited. See Pet. Br. 22-23.

b. To argue that appellate review of an "order" does not necessarily entail review of the entire order, respondent points to this Court's interpretation of three statutes that govern appellate jurisdiction using the terms "judgment" and "decision." See Br. 11-14. Respondent's examples are inapposite.

i. Respondent first invokes this Court's interpretation of its own jurisdiction under 28 U.S.C. 1257, which authorizes review of a state-court judgment that involves issues of federal law. Congress first authorized such review in the Judiciary Act of 1789, but the relevant provision allowed the Court to reverse only if the state court erroneously decided the federal question. See ch. 20, § 25, 1 Stat. 86-87. In 1867, Congress enacted a similar provision but omitted that limiting language. See Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 386-387. Despite the omission, a divided Court held in *Murdock* v. *Memphis*, 87 U.S. (20 Wall.) 590 (1875), that Congress had not intended to authorize the Court to decide questions of state law.

The decision in *Murdock* is not generalizable to other jurisdictional statutes, because it was driven by federalism concerns unique to the context of Section 1257 (as opposed to merely the statutory text and history, which pointed in the opposite direction, see, *e.g.*, Jonathan F. Mitchell, *Reconsidering 'Murdock': State-Law Reversals As Constitutional Avoidance*, 77 U. Chi. L. Rev. 1335, 1351-1352 (2010)). In particular, the Court emphasized the "fundamental principle" that "the appellate power of this [C]ourt over the courts of the States" was "limited to the correction of errors relating solely to Federal law." 87 U.S. (20 Wall.) at 630. The Court explained that, if Congress had intended to deviate from that principle when it amended the Judiciary Act of 1789 (and thereby to alter the relationship between the federal and state courts), "it is reasonably to be expected that Congress would use plain, unmistakable language in giving expression to such intention." *Id.* at 619. Indeed, the Court left open the question whether Congress would even have the constitutional power to do so. See *id.* at 633. That unique context renders *Murdock* of limited utility here, where such concerns are not implicated. See p. 5, *supra*.

ii. Respondent next invokes the collateral-order doctrine, which stems from a "practical" construction of the phrase "final decision" in 28 U.S.C. 1291. See *Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009) (citation omitted). If anything, the collateral-order doctrine favors the plain-text interpretation, not respondent's, because review under that doctrine is not limited to the particular issue that permitted the appeal. See, *e.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672-675 (2009); *Wilkie* v. *Robbins*, 551 U.S. 537, 549 n.4 (2007); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 172-177 & n.10 (1974). While review may not necessarily extend to *every* issue in an appealable collateral order, see Resp. Br. 13, any limitations appear to be a matter of judicial discretion rather than statutory mandate. See 15A Charles Alan Wright et al., *Federal Practice & Procedure* § 3911.2, at 395 (2d ed. 1992) (Wright & Miller).

In fact, respondent's reliance on Section 1291 affirmatively undermines its position. The ordinary "final judgment" rule under Section 1291 is that appellate jurisdiction extends to a district court's entire judgment and all issues encompassed in it. See Pet. Br. 24. If, as respondent contends, there is "no relevant distinction" between the terms "decision" in Section 1291 and "order" in Section 1447(d), Br. 11 n.1, then review under Section 1447(d) should logically extend to the entire remand order.

iii. Respondent's final example is the now-repealed Criminal Appeals Act, which permitted the government to seek direct review in this Court of a district court's "decision or judgment" in a criminal case addressing certain enumerated issues. Pub. L. No. 59-223, 34 Stat. 1246 (1907); see Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, § 14, 84 Stat. 1890. Soon after its enactment, in *United States* v. *Keitel*, 211 U.S. 370 (1908), the Court

interpreted the Act to permit review of only the issues enumerated in the statute.

The decision in *Keitel* is of limited significance outside its particular context. There, the Court concluded that the Criminal Appeals Act permitted review only of the enumerated issues because it viewed "the purpose of the statute" as permitting review of "the subjects embraced within the clauses of the statute" and not of "the whole case." 211 U.S. at 398. The Court reasoned that such a narrow interpretation was warranted because the ability of the government to appeal in a criminal case was "exceptional." *Id.* at 399. The Court later explained that the Act's "background and legislative history" justified the application of a "principle of strict construction," because the history "reveal[ed] a strong current of congressional solicitude for the plight of a criminal defendant exposed to additional expense and anxiety by a government appeal." *United States* v. *Sisson*, 399 U.S. 267, 291, 298 (1970). Again, Section 1447(d) does not implicate those unusual considerations—regardless of whether the Court's interpretation of the Criminal Appeals Act, made at a time when statutory text carried little weight, was defensible as an original matter.

3. The Plain-Text Interpretation Of Section 1447(d) Serves The Provision's Purposes

Respondent contends (Br. 35-40) that the plain-text interpretation undermines, rather than advances, the purposes of Section 1447(d). That is incorrect.

a. Respondent asserts that there is "no basis" to believe that Congress authorized review of remand orders for "defendants who allege, wrongly, that they are entitled to remov[al]" under the federal-officer or civil-rights removal statutes. Br. 40. But respondent does not appear to dispute that significant and related federal interests

are often present even when the argument for removal under those statutes is ultimately unsuccessful. See Pet. Br. 26-29; U.S. Br. 28-29; Chamber Br. 19-22.

Instead, respondent believes that, because Congress has not authorized appellate review of remand orders in *all* cases that "implicate federal concerns," it must not have done so in Section 1447(d). Br. 39 (internal quotation marks omitted). But Congress is not required to pursue a policy objective at all costs. Given the particular federal interests implicated in cases removed on federal-officer or civil-rights grounds, it makes good sense that Congress would want appellate review of those cases in order to determine whether any basis for federal jurisdiction exists.

b. Respondent next contends that allowing appellate review of an entire remand order would cost courts and litigants "considerable time and resources." Br. 35. But respondent's only support for that proposition is the length of the briefing on respondent's motion to remand *in this case*. See Br. 36. The fact that this case involves multiple grounds for removal is a direct result of respondent's novel theory of liability under state law for global climate change. In a more typical case, the time to brief and argue an additional ground for removal is likely to be insignificant—and it may even lead to a *more* efficient resolution of the appeal. See U.S. Br. 25.

c. In addition, respondent raises the specter of gamesmanship. See Br. 36-39. To begin with, respondent cannot seriously contend that petitioners' argument for federal-officer removal—to which the court of appeals devoted over 20 pages of analysis in its opinion, see Pet. App. 10a-30a—was frivolous and designed only to secure a right to an appeal. See Pet. Br. 8; API Br. 6-28; Former Joint Chiefs Br. 3-21. Nor has respondent identified a single example of a case in which a defendant has engaged in such gamesmanship in any court subject to the plain-text

interpretation. See DRI Br. 20. Notably, the leading treatise on federal jurisdiction rejected that very concern when endorsing petitioners' interpretation of Section 1447(d). See 15A Wright & Miller § 3914.11, at 706.

Respondent disputes that cost-shifting mechanisms and sanctions will have a "significant deterrent effect" in the removal context because such awards are rare and reserved for truly frivolous claims. Br. 38. That could be said about sanctions in any context, yet this Court has repeatedly recognized the power of sanctions to deter improper conduct by litigants. See, *e.g.*, *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019); *Arthur Andersen*, 556 U.S. at 629; *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352, 363 (1995). And the fact that respondent cites cases from every regional circuit involving fee awards under Section 1447(c) demonstrates they are readily available as an option to deter any gamesmanship. See Br. 18.

B. The Court Should Reverse The Judgment Below

Once the Court resolves the question presented, it should proceed to reverse the judgment below on the ground that removal was proper because respondent's claims necessarily arise under federal common law.

1. While respondent does not contend that the Court lacks the power to reach the federal-common-law ground for removal if the Court decides the Section 1447(d) question in petitioners' favor, it argues (Br. 41-44) that the Court should decline to consider that ground because it is not fairly included in the question presented and because the court of appeals below did not decide it.

The Court has the discretion to address the federal-common-law ground for removal, and it would be entirely appropriate to do so here. If the Court agrees with petitioners on the question presented, whether respondent's

claims necessarily arise under federal common law affects whether reversal or vacatur is the appropriate disposition. The Court has often decided issues separate from the question on which it granted review in order to determine the correct disposition once that question has been resolved. For example, in *McCoy* v. *Louisiana*, 138 S. Ct. 1500 (2018), the Court resolved the Sixth Amendment question on which it granted review and proceeded to decide whether the trial court's error was structural in nature in order to determine whether a new trial was required on remand. See *id.* at 1510-1512 & n.4. The Court did so after the petitioner raised the issue in his opening brief and the respondent "explicitly chose not to grapple with it." *Id.* at 1511 n.4. Other cases are to the same effect. See, *e.g.*, *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773, 1781-1782 (2017); *Horne* v. *Department of Agriculture*, 135 S. Ct. 2419, 2431-2433 (2015); *Perdue* v. *Kenny A. ex rel. Winn*, 559 U.S. 542, 557-559 (2010); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 47 & n.34 (1977).

Respondent protests that petitioners have "smuggl[ed]" the federal-common-law ground for removal into the case. See Br. 41. But in the petition for a writ of certiorari, petitioners plainly signaled their intention to argue that the Court should "address the remaining grounds for removal and reverse the judgment below." Pet. 20. Consistent with that representation, petitioners briefed the issue in their opening merits brief, see Pet. Br. 37-46; so too did the United States, which has agreed with petitioners that removal is proper because climate-change-related claims necessarily arise under federal law, see U.S. Br. 26-28; U.S. Reh'g Br. at 6-12, *City of Oakland* v. *BP p.l.c.*, 969 F.3d 895 (9th Cir. 2020) (No. 18-16663); and respondent and its amici have responded in kind, see

Resp. Br. 44-46; NRDC Br. 4-23; Boulder Br. 13-28; see also Resp. C.A. Br. 21-28.

The Court's "[e]xercise of [its] discretion" to reach the federal-common-law ground for removal is particularly "called for under th[e] unusual circumstances" here. *Piper*, 430 U.S. at 47 n.34. That ground for removal is currently being litigated in 19 similar climate-change cases in federal courts across the country. See Pet. Br. 7 n.1. Indeed, since petitioners filed their opening brief in this case, four petitions for writs of certiorari have been filed that present the federal-common-law ground for removal either directly or indirectly. See *Suncor Energy (U.S.A.) Inc.* v. *Board of County Commissioners of Boulder County*, No. 20-783 (filed Dec. 4, 2020); *Chevron Corp.* v. *County of San Mateo*, No. 20-884 (filed Dec. 30, 2020); *Shell Oil Products Co.* v. *Rhode Island*, No. 20-900 (filed Dec. 30, 2020); *Chevron Corp.* v. *City of Oakland* (filed Jan. 8, 2021). Respondent does not seriously dispute that there would be significant efficiency gains, for the judiciary and the parties alike, in resolving that ground for removal now, rather than after months or even years of pointless litigation in both the federal and state courts.

2. This Court's longstanding precedents dictate the common-sense conclusion that federal law, not state law, governs claims alleging injury caused by global climate change. Respondent's contrary arguments are unpersuasive.

a. Respondent first contends that its claims do not arise under federal law because "'[i]nterstate pollution' is not the wrongful conduct challenged" by the common-law claims alleged. Br. 44. Yet respondent's alleged harms—the effects of global climate change—all flow from interstate and international greenhouse-gas emissions. See J.A. 25, 58-87, 145-155. Because respondent's claims are "ultimately based on the 'transboundary' emission of

greenhouse gases," the structure of our constitutional system requires federal law to govern those claims. *City of New York* v. *BP p.l.c.*, 325 F. Supp. 3d 466, 472 (S.D.N.Y. 2018), appeal pending, No. 18-2188 (2d Cir.); see *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410, 422 (2011).

b. Respondent next contends that the Court would need to "create a new category of federal common law" in order to permit removal on that basis. Br. 45. Not so. As petitioners have already explained (Br. 40), this Court has applied uniform federal rules of decision to common-law claims seeking redress for interstate air and water pollution for more than a century. That is the same category of federal common law that governs respondent's claims here.

To be sure, this case is being brought by a local government, not a State. But federal common law can apply even in suits in which neither the federal government nor a State is a party. See, *e.g.*, *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 511 (1988). Regardless of the identity of the parties, our constitutional structure does not permit one State (much less one municipality) to "impos[e] its regulatory policies on the entire Nation." *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 585 (1996).

c. Respondent also argues that, even if the "federal common law of interstate emissions" governs its claims, the case is not removable because the Clean Air Act has "displaced" that law. Br. 45. That argument conflates the jurisdictional question (whether a claim arises under federal law) with the merits question (whether the claimant has a valid cause of action under federal law)—questions this Court has made clear are distinct. See, *e.g.*, *American Electric Power*, 564 U.S. at 422.

The Court's decision in *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947), demonstrates the appropriate

two-step analysis. There, the Court first held that federal law, not state law, controlled the "essentially federal" question of whether the government could recover for the hospital costs and lost services of a soldier hurt in a traffic accident. *Id.* at 307. But then, emphasizing its "modest" capacity to "create new common-law liabilities," the Court proceeded to hold that establishing a cause of action was a task for Congress. *Id.* at 313, 316. The claim in *Standard Oil* thus arose under federal law even though no federal cause of action existed. The same is true here: respondent's claims arise under federal law even if federal law does not ultimately provide a remedy.

It is also incorrect to say that, if a federal statute displaces any remedy available under federal common law, state law fills the void. In cases that involve "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations," only federal law can apply, because "our federal system does not permit the controversy to be resolved under state law" at all. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). There is therefore no state law for the Clean Air Act (or any other federal statute) to resurrect. See U.S. Br. 27.

d. Finally, respondent invokes the well-pleaded complaint rule. See Br. 45-46. But in doing so, respondent misunderstands the relationship between state law and federal common law. To be sure, plaintiffs can usually avoid removal by pleading only state-law claims, even if federal claims are available. See *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 (1987). But in an area that the Constitution instructs is governed exclusively by federal law, state law *cannot apply*: "if federal common law exists, it is because state law cannot be used." *Milwaukee* v. *Illinois*, 451 U.S. 304, 313 n.7 (1981); see U.S. Br. 27. Put another way, such a plaintiff cannot choose between

state and federal law, because no state law exists. See p. 20, *supra*. Any claims by the plaintiff, even if "nominally couched as state-law claims," are "inherently and necessarily federal in nature." U.S. Br. 26.

Respondent nevertheless argues (Br. 46) that the artful-pleading doctrine applies only in complete-preemption cases. But the Court has explained more generally that an "independent corollary" of the well-pleaded complaint rule is that a plaintiff "may not defeat removal by omitting to plead necessary federal questions in a complaint." *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 22 (1983). A federal question is "necessary" not only where "federal law completely preempts a plaintiff's state-law claim," *Rivet* v. *Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998), but also where the constitutional structure mandates the application of federal law. See U.S. Br. 28.

The court of appeals erred by concluding that it lacked jurisdiction under 28 U.S.C. 1447(d) to decide whether this case is removable because respondent's claims necessarily arise under federal law. Because this case was so clearly removable on that basis, the Court should reverse the judgment outright and hold that the case should proceed in federal court.

* * * * *

The judgment of the court of appeals should be reversed. In the alternative, the judgment should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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