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

BRIEF OF INDIANA, ALASKA, ARKANSAS, GEORGIA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, OHIO, SOUTH CAROLINA, TEXAS, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether 28 U.S.C. § 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. § 1442, or the civil-rights removal statute, 28 U.S.C. § 1443.

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INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Alaska, Arkansas, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Ohio, South Carolina, Texas, and Utah respectfully submit this brief as *amici curiae* in support of the petitioners.

As litigants who often find themselves on either side of motions to remand cases back to state court, *Amici* States file this amicus brief to urge the Court to answer an important question governing the scope of appellate review of such remands: When a party seeks to remove a case based in part on the federal-officer removal statute or civil-rights removal statute, is appellate review of a remand order rejecting removal limited to the federal-officer or civil-rights grounds, or does appellate review encompass every ground raised in support of removal?

Amici States recognize the importance of this question and the need for a single, clear answer. They file this brief to explain why the Court should provide such an answer and hold that, so long as the appellant has raised non-frivolous federal-officer or civil-rights grounds for removal, appellate review encompasses all grounds for removal.

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice of *Amici* States' intention to file this brief at least 10 days prior to the due date of this brief.

REASONS FOR GRANTING THE PETITION

Every year state-court defendants remove tens of thousands of cases to federal court. State-court plaintiffs often respond with motions to remand the case back to state court, and a great many of these motions are granted: In the last five years, remand orders terminated nearly 27,000 federal cases.[2]

The large volume of remand orders makes the rules regulating the availability and scope of their appellate review a matter of nationwide significance. Litigants need to know in advance whether a district court's remand order will end the federal-court litigation or will instead begin the federal appellate process; the rules governing remand orders' appealability affect not only whether the party supporting removal bothers with an appeal, but also which arguments for and against remand the parties make to the district court. And these rules have just as much significance for appellate courts, whose jurisdiction turns on them. It is thus essential that these rules—provided by 28 U.S.C. § 1447(d)—be clear.

Unfortunately, however, clarity is precisely what judicial interpretation of 1447(d) has long lacked. There is no doubt that 1447(d) permits appeals of *some* remand orders, but courts have struggled for

[2] All case data are drawn from the Federal Judicial Center's Integrated Database of civil cases, available at https://www.fjc.gov/research/idb/interactive/IDB-civil-since-1988. A search for cases that (1) originated with removal, (2) were terminated by a remand to state court, and (3) were terminated between January 1, 2015 and December 31, 2019 produces a list of 26,800 cases.

decades to determine which orders are appealable and, for those that are, which issues are included in the scope of the appeal. In just the last fifteen years, for example, the Court has attempted to clarify 1447(d)'s rules for the appealability of remand orders four separate times.

Yet 1447(d) continues to confound—in particular, its authorization of appellate review of any "order remanding a case" that "was removed pursuant to" the federal-officer or civil-rights removal statutes. 28 U.S.C. § 1447(d). There is a deep and abiding circuit split regarding whether, when removal is based in part on these statutes, this authorization of appellate review is limited to the federal-officer or civil-rights grounds alone or instead permits consideration of *all* grounds raised in support of removal. This question, squarely presented here, deserves a clear and uniform answer, which can come only from this Court.

The Court should grant the petition and, ultimately, hold that once a court has appellate jurisdiction to review a remand order, it has authority to consider *every* argument pertaining to the order's validity. Such a rule makes the best sense of the statutory text and the best use of judicial resources.

I. The Appealability of Remand Orders Is an Issue of National Importance That Requires Clear, Uniform Rules

Subsection 1447(d) provides that in general an "order remanding a case to the State court from which it

was removed is *not* reviewable on appeal or otherwise." 28 U.S.C. § 1447(d) (emphasis added). The provision affords two crucial exceptions, however, and provides "that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title [the federal-officer and civil-rights removal statutes, respectively] *shall* be reviewable by appeal or otherwise." *Id.* (emphasis added).

The numerous cases the Court has taken to elucidate the meaning of this provision attest to the Court's longstanding recognition of the importance of giving it a clear and consistent interpretation: Because 1447(d) potentially affects thousands of cases annually and goes to the jurisdiction of federal appellate courts, it is especially important that it be applied in the same, predictable way across the country. The Court has thus regularly stepped in when the lower courts have proved unable to agree on the statute's proper application. It should do so again here.

1. Congress has authorized federal courts to hear cases removed from state court since the Judiciary Act of 1789 first established the federal-court system. *See* 1 Stat. 73, c. 20, § 12 (authorizing removal of state-court cases against aliens and nonresident defendants as well as state-court cases involving competing land grants issued by different States). And for nearly as long as federal courts have possessed authority to hear removal cases, litigants have been disputing what constitutes proper grounds for exercising that authority—and have been seeking appellate review of decisions with which they disagree. Until

1875, an erstwhile state-court defendant could obtain review of a remand decision via writ of mandamus. *See Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. 336, 346 (1976) (citing *Chicago & A.R. Co. v. Wiswall*, 23 Wall. 507 (1875)). But that year Congress expanded the class of removable cases and authorized review of remand orders by writ of error or appeal to this Court. *See* Act of March 3, 1875, c. 137, §§ 2, 5, 18 Stat. 470–72. Twelve years later, Congress reversed course: It narrowed the scope of removal, authorized remand where removal was improper (on jurisdictional grounds or otherwise), and foreclosed appellate review of remand orders. *See* Wright & Miller, Federal Practice & Procedure § 3721 (Rev. 4th ed.) (citing Act of March 3, 1887, c. 373, 24 Stat. 552); *Thermtron*, 423 U.S. at 347 ("[N]o appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." (quoting same)).

These provisions authorizing remand orders and prohibiting their appellate review have for the most part endured. The text now codified at subsections 1447(c) and (d) "represent the 1948 recodification" of the 1887 enactments. *Id.* at 349. And seventy-two years later, 1447(c) continues to authorize remands for "any defect" (including jurisdiction) while 1447(d) continues to deem such remand orders to be generally "not reviewable on appeal or otherwise."

Importantly, however, Congress has twice amended 1447(d) to carve out exceptions from its general bar on appellate review. The Civil Rights Act of

1964 amended subsection 1447(d) to authorize review, "by appeal or otherwise," of any "order remanding a case to the State court from which it was removed pursuant to section 1443," which authorizes removal of civil-rights cases. 78 Stat. 266. And in 2011 Congress authorized appellate review of remand orders in cases removed under section 1442, which authorizes removal of cases involving federal officers, agencies, and grants of property. *See* Pub. L. 112-51 (inserting "1442 or" before 1443 in subsection 1447(d)).

2. As the petition explains, 1447(d)'s exceptions for civil-rights and federal-officer cases have produced a deep, durable split among the federal courts of appeals. *See generally* Pet. 11–17. Six separate circuit courts have held that—regardless of other grounds raised in support of removal—1447(d) allows appellate courts to consider *only* grounds for removal based on the civil-rights and federal-officer removal statutes. *See State Farm Mutual Automobile Insurance Co. v. Baasch*, 644 F.2d 94 (2d Cir. 1981); *Davis v. Glanton*, 107 F.3d 1044 (3d Cir. 1997); *Mayor & City Council of Baltimore v. BP p.l.c.*, 952 F.3d 452 (4th Cir. 2020); *Jacks v. Meridian Resource Co.*, 701 F.3d 1224 (8th Cir. 2012); *Patel v. Del Taco, Inc.*, 446 F.3d 996 (9th Cir. 2006); *Alabama v. Conley*, 245 F.3d 1292 (11th Cir. 2001). Three other circuit courts, however, have held that when a remand order rejects a removal that was based in part on the civil-rights or federal-officer removal statutes, 1447(d) permits appellate review of the entire remand order, including *all* grounds raised in support of removal. *See Decatur Hospital*

Authority v. Aetna Health, Inc., 854 F.3d 292 (5th Cir. 2017); *Mays v. City of Flint*, 871 F.3d 437 (6th Cir. 2017); *Lu Junhong v. Boeing Co.*, 792 F.3d 805 (7th Cir. 2015). In short, the circuits disagree over whether 1447(d)'s exceptions apply to particular *orders* and all rulings made therein, or whether they apply only to particular *grounds* for removal.

This entrenched lower-court disagreement requires the Court's intervention. Litigants need to know when remand orders will be appealable and what issues will be reviewable in those appeals. Any number of strategic decisions may turn on the answers to these questions—not only what arguments the parties emphasize on appeal, but also whether the remand order is appealed at all, which grounds the state-court defendants initially raise in support of removal, and even how the state-court plaintiffs draft the original complaint.

Because these questions arise in thousands of cases each year, resolving this circuit split is a matter of nationwide significance. In 2019 alone, state court defendants removed more than 35,000 cases to federal court[3]—nearly twelve percent of all federal cases filed that year[4]—and more than 4,300 of these cases

[3] A search for cases that (1) originated with removal and (2) were filed between January 1, 2019 and December 31, 2019 produces a list of 35,289 cases.

[4] A search for cases that were filed between January 1, 2019 and December 31, 2019 produces a list of 296,138 cases. 35,289 is 11.9% of 296,138.

have been remanded back to state court.[5] The numbers for 2018 are similar: approximately 33,000 cases removed,[6] about 5,400 of which were remanded.[7]

Moreover, as a jurisdictional statute, 1447(d) must conform to the longstanding "rule that '[j]urisdictional rules should be clear.'" *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 14 (2015) (quoting *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 321 (2005) (Thomas, J., concurring)); *see also Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 621 (2002) (same). Hazy answers to jurisdictional questions burden litigants and inevitably "produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Courts too "benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Id.* "Clarity is to be desired

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[5] A search for cases that (1) originated with removal, (2) were terminated by a remand to state court, and (3) were filed between January 1, 2019 and December 31, 2019 produces a list of 4,329 cases.

[6] A search for cases that (1) originated with removal and (2) were filed between January 1, 2018 and December 31, 2018 produces a list of 33,033 cases.

[7] A search for cases that (1) originated with removal, (2) were terminated by a remand to state court, and (3) were filed between January 1, 2018 and December 31, 2018 produces a list of 5,423 cases.

in any statute, but in matters of jurisdiction it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case." *United States v. Sisson*, 399 U.S. 267, 307 (1970).

For these reasons, the Court often grants certiorari to resolve such "important question[s] of federal appellate jurisdiction." *Tidewater Oil Co. v. United States*, 409 U.S. 151, 153 (1972). *See also, e.g., Nasrallah v. Barr*, 140 S. Ct. 428 (2019) (granting certiorari to decide whether the Immigration and Nationality Act authorizes appellate jurisdiction to review factual findings underlying denials of withholding of removal relief); *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020) (holding that the Immigration and Nationality Act authorizes appellate jurisdiction to review an immigration judge's application of a legal standard to undisputed or established facts); *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019) (holding that the deadline for seeking immediate appeal from a class-certification order is not subject to equitable tolling); *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017) (holding that the deadline for seeking an extension of time to file a notice of appeal is a non-jurisdictional claim-processing rule).

The circuit split over 1447(d)'s exceptions has left litigants confused about the application of a jurisdiction provision that affects thousands of cases a year. It is time for the Court to resolve this confusion.

3. The Court's longstanding efforts to resolve many *other* applications of 1447(d) underscores the importance of giving it a clear, uniform construction here. Because it is a widely applicable jurisdictional provision, the Court has often acted to bring clarity to 1447(d). It should do so again here.

In particular, the Court has frequently reviewed whether 1447(d)'s appellate-review bar permits additional exceptions beyond civil-rights and federal-officer cases. In *Thermtron*, the Court addressed whether 1447(d)'s prohibition on appellate review is limited to jurisdictional or procedural defects—the grounds for remand listed in 1447(c). 423 U.S. at 340–41. The Court held that 1447(d) *is* so limited, explaining that 1447(d) and 1447(c) "must be construed together," which "means that *only* remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d)." 423 U.S. at 345–46 (emphasis added). The very next year, however, the Court reiterated that remands based on 1447(c) grounds are categorically unreviewable. *See Gravitt v. Sw. Bell Tel. Co.*, 430 U.S. 723, 723 (1977) (per curiam) ("[Subsection] 1447(c) remands are not reviewable."); *Briscoe v. Bell*, 432 U.S. 404, 414 n.13 (1977) ("Where the order is based on one of the enumerated grounds, review is unavailable no matter how plain the legal error in ordering the remand.").

The Court returned to 1447(d) two decades later in *Things Remembered, Inc. v. Petrarca*, where it held

that 1447(d)'s appellate-review bar applies to bankruptcy removals. 516 U.S. 124, 129 (1995). That same term, in *Quackenbush v. Allstate Insurance Co.*, the Court addressed 1447(d)'s application to remand orders grounded in abstention, holding that the appellate-review bar does not apply to such orders because an "abstention-based remand order does not fall into either category of remand order described in § 1447(c), as it is not based on lack of subject matter jurisdiction or defects in removal procedure." 517 U.S. 706, 711–12 (1996).

The Court again addressed 1447(d) ten years later, "grant[ing] certiorari to resolve a split of authority on the question whether § 1447(d) bars review of remand orders in cases removed under the [Private Securities Litigation Reform Act]." *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 639 (2006). It held that "the Act does not exempt remand orders from 28 U.S.C. § 1447(d) and its general rule of nonappealability." *Id.* at 648.

The following year, the Court decided a pair of cases in which the Court itself raised the 1447(d) issue—*Osborn v. Haley*, 549 U.S. 225, 239 (2007), and *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 226 (2007). In *Osborn* the Court held that a statute authorizing the Attorney General to "conclusively establish" a state-court defendant's federal employment "for purposes of removal," 28 U.S.C. § 2679(d)(2), displaced 1447(d)'s appellate-review bar. 549 U.S. at 243–44. And in *Powerex* it held that 1447(d)'s prohibition on appellate review applies even where removal was initially proper but the district

court later loses jurisdiction and remands. 551 U.S. at 230–32.

Finally, the Court most recently addressed 1447(d)'s appellate-review bar in *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. 635 (2009). There the Court granted certiorari to "decide[] whether a district court's order remanding a case to state court after declining to exercise supplemental jurisdiction is a remand for lack of subject-matter jurisdiction for which appellate review is barred by §§ 1447(c) and (d)." It held that "such remand orders are not based on a lack of subject-matter jurisdiction," and thus fall outside the scope of 1447(d). *Id.*

These decisions demonstrate the Court's concerted efforts to clarify 1447(d)'s rules for appealing remand orders—even when the parties do not raise the issue. And this case warrants review every bit as much as those cases. The confusion over 1447(d)'s exceptions for civil-rights and federal-officer cases is "forc[ing] parties and lower courts to guess when § 1447(d) will and will not apply." *Kakarala v. Wells Fargo Bank, N.A.*, 136 S. Ct. 1153, 1154 (2016) (Thomas, J., dissenting from the denial of certiorari). The Court should countenance this confusion no longer.

II. The Court Should Reverse the Decision Below and Hold That When a Remand Order Is Lawfully Appealed, the Appeal Encompasses All Grounds for Removal

As frequent parties to removal cases who find themselves on one side as often as the other, *Amici*

States are chiefly interested in obtaining clarity on the question presented in this case, whatever answer the Court chooses. The principle that "in most matters it is more important that the applicable rule of law be settled than that it be settled right," has particular force where, as here, the matter pertains to a technical jurisdictional rule that Congress can easily alter. *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *see also Ramos v. Louisiana*, No. 18-5924, (U.S. Apr. 20, 2020) (Kavanaugh, J., concurring in part) slip op. at 5 (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

The best resolution of this case, however, would be to reverse the decision below and hold that when 1447(d) authorizes an appeal of a remand order, it authorizes consideration of *all* arguments relevant to the order's validity. This interpretation accords with 1447(d)'s specific language and coheres with the overall statutory framework for removal.

This statutory framework provides that the removal process begins when "defendants desiring to remove any civil action from a State court" file "a notice of removal" that contains "a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). "[P]romptly after the filing of such notice of removal," the defendant gives notice to adverse parties and files "a copy of the notice with the clerk of such State court." 28 U.S.C. § 1446(d). Importantly, the filing of the notice with the state court "*shall effect the removal* and the State court shall proceed no further unless and until the case is remanded." *Id.* In other words,

the case is "removed" as soon as the state-court notice is filed.

Accordingly, when a notice cites several grounds for removal and one of those grounds includes the civil-rights or federal-officer removal statute, it is correct to say that the case "was removed pursuant to section 1442 or 1443." 28 U.S.C. § 1447(d). The application of 1447(d) is straightforward from there: It states that "an *order* remanding [such] a case to the State court from which it was removed . . . shall be reviewable by appeal or otherwise." *Id.* (emphasis added). Section 1447(d), in other words, authorizes appeal of the *order*—without limitation.

For this reason, when a remand order rejecting removal on civil-rights or federal-officer grounds is lawfully appealed under 1447(d), the court of appeals has jurisdiction to consider *all* grounds raised in favor of removal—including those for which the defendant would not otherwise be able to obtain appellate review. As Judge Easterbrook's opinion for the Seventh Circuit explained in the course of adopting this interpretation of 1447(d), "[t]o say that a district court's 'order' is reviewable is to allow appellate review of the *whole* order, not just of particular issues or reasons." *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015). The leading federal-courts treatise agrees. *See* Wright & Miller, Federal Practice & Procedure § 3914.11 (Rev. 4th ed.) ("Review should . . . be extended to all possible grounds for removal underlying the order. Once an appeal is taken there is very little to be gained by limiting review . . . .").

The "whole order" interpretation of 1447(d) is further supported by the Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), which construed the statute authorizing permissive appeal of some interlocutory "*orders*" to permit appellate review of all *issues* decided within such a properly appealed order. *Id.* at 204–05 (quoting 28 U.S.C. § 1292(b) (emphasis in original)). The Court underscored the importance of the statute's use of the word "order," observing that "appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Id.* at 205 (emphasis in original). The Court thus held that while the Court of Appeals "may not reach beyond the certified order to address other orders made in the case," it "may address any issue fairly included within the certified order because it is the *order* that is appealable, and not the controlling question identified by the district court." *Id.* (emphasis in original; internal quotation marks and citations omitted). Section 1447(d) provides no textual (or historical) basis for differing treatment of an "order" properly appealed under its authority.

Beyond making the best sense of the statute, reading 1447(d) to permit appeal of the whole remand order also makes the best use of litigants' and courts' time. As Judge Easterbrook observed, "once Congress has authorized appellate review of a remand order"—as it has when the state-court defendant relies on the civil-rights or federal-officer removal statutes—"[t]he marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision

has already been accepted is likely to be small." *Lu Junhong*, 792 F.3d at 813.

Rather than accept that 1447(d) authorizes appeals of *orders*, the Fourth Circuit's decision below mistakenly limits its authorization of appellate review to only civil-rights and federal-officer grounds for removal. Pet. App. 7a. The Fourth Circuit based this conclusion upon its earlier decision in *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976), and *that* decision's discussion of the issue consists entirely of a citation to the Sixth Circuit's half-century-old decision in *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 533 (6th Cir. 1970). The Sixth Circuit, however, has since implicitly repudiated *Appalachian Volunteers*, following the Seventh Circuit in holding that jurisdiction to review a remand order under 1447(d) "encompasses review of the district court's decision on the alternative ground for removal under 28 U.S.C. § 1441." *Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017) (citing *Lu Junhong*, 792 F.3d at 811–13).

In any case, the rationale provided in *Appalachian Volunteers* cannot justify ignoring the plain meaning of 1447(d)'s text. That decision assumed that 1447(d)'s "obvious purpose . . . is to avoid the delays which would result if appeals from remand orders were permitted," and reasoned that "even when removal is based on 28 U.S.C. § 1443 and an appeal is authorized, the review of issues other than those directly related to the propriety of the remand order itself would

frustrate the clear Congressional policy of expedition." *Appalachian Volunteers*, 432 F.2d at 533.

This Court, however, "has long rejected the notion that 'whatever furthers the statute's primary objective must be the law.'" *Cyan, Inc. v. Beaver Cty. Employees Ret. Fund*, 138 S. Ct. 1061, 1073 (2018) (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam)). After all, courts "do not generally expect statutes to fulfill 100% of all of their goals." *Id.* In *Cyan*, for example, the Court held that federal law does not authorize removal of class actions brought under the 1933 Securities Act, rejecting the federal government's attempt to "distort[]" the statutory text on the ground that "Congress simply must have wanted 1933 Act class actions to be litigated in federal court." *Id.* at 1078. "Where, as here, the language of a provision is sufficiently clear in its context and not at odds with the legislative history, there is no occasion to examine the additional considerations of policy that may have influenced the lawmakers in their formulation of the statute." *Rodriguez*, 480 U.S. at 526 (cleaned up).

The Court should grant the petition, resolve the confusion among the lower courts, and hold that 1447(d) authorizes appellate review, without limitation, of any "order" remanding a case for which removal was premised at least in part on the civil-rights or federal-officer removal statutes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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