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 STATE AND LOCAL GOVERNMENT GROUPS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

State and Local Government *Amici* comprise seven of the nation's leading state or local government associations.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides

[1] Pursuant to S. Ct. Rule 37.6, counsel for all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person or entity other than amicus, its members, or counsel made a monetary contribution to its preparation or submission..

research, technical assistance, and opportunities for policymakers to exchange ideas on pressing issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits amicus briefs in cases, like this one, that raise issues of vital state concern.

The Council of State Governments (CSG) is the nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. It offers regional, national, and international opportunities for its members to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national association that represents county governments in the United States. Founded in 1935, NACo serves as an advocate for county governments and works to ensure that counties have the resources, skills, and support they need to serve and lead their communities.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with forty-nine State municipal leagues, NLC serves as a national advocate for more than 19,000 cities and towns, representing more than 218 million Americans.

The U.S. Conference of Mayors (USCM) is the official non-partisan organization of U.S. cities with a population of more than 30,000 people (approximately 1,400 cities in total).

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan professional organization consisting of more than 2,500 members. The membership is composed of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

State and Local Government *Amici*'s members appear in court both as plaintiffs and defendants. As a result, they have an acute understanding of the

different interests parties may have depending on which side of the "v." they occupy in any particular case. When appearing as a plaintiff, like other claimants, *Amici's* members have a sincere interest in serving as masters of their complaint, both choosing the claims that they seek to litigate and the forum most appropriate to the matter.

Under the police and other powers they hold, *Amici's* members have direct responsibilities for understanding the risks to and planning for the well-being of the American public. It is their discharge of those responsibilities that can sometimes take them to court – sometimes as defendants based on a person's objections to what they have done; sometimes as plaintiffs based on the need for court intervention to address an obstacle to their work.

Regardless of the role they play in any particular piece of litigation, as representatives of state and local governments nationwide, *Amici* are particularly sensitive to the need to maintain a balanced federal-state judicial system. This case, which seeks a determination of a local government's rights *under state law*, raises a critical federalism issue: the appropriate scope of appellate review of a district court's remand order under 28 U.S.C. § 1447(d). Allowing any defendant to obtain plenary review of all aspects of a remand order just by including an argument for federal-officer removal would fundamentally disrupt state and local governments' ability to litigate claims brought under state law in state courts and incentivize defendants in those actions to include meritless federal-officer removal

claims and increase attempts to appeal remand orders due to that inclusion.

Should the Court extend its review beyond this limitation, State and Local Government *Amici* have a unique interest in the Court's proper recognition of state-court jurisdiction over distinctively state law claims. The district court here properly found that it lacked subject-matter jurisdiction over Plaintiff's state law claims. Judicial conversion of a variety of well-pleaded state law claims into vaguely defined federal common law or arising-under claims, and the exercise of federal jurisdiction over them that Petitioners seek, would threaten to fundamentally intrude upon state and local governments' authority within our federalist system to rely on state law and state courts to seek redress for localized harms. Moreover, State and Local *Amici* assert that any suggestion that state courts cannot handle these issues fairly and appropriately is misplaced.

The lower court's decision in this case is fully consistent with essential federalism principles and recognizes the right of local governments to bring state-law claims in state courts. State and Local Government *Amici* respectfully urge this Court to limit the scope of its review to the sole issue properly before it, concerning Defendants' meritless claim that an assertion of federal-officer removal justifies plenary review of all asserted grounds for removal. Should the Court conduct a review beyond that question, it should affirm the decision to remand for lack of subject-matter jurisdiction and sustain the viability of Plaintiff's state law claims.

SUMMARY OF ARGUMENT

Properly construed, Section 1447(d) makes federal-officer removal alone subject to appeal from an order remanding a case to state court after removal. Statutory text, congressional ratification of preexisting interpretations, legislative intent, and the principles animating our federalist system all drive that conclusion and support affirmance of the Fourth Circuit's decision in this case.

Words in a statute take their meaning from context, preexisting interpretations when Congress adopts it without change when adding to a statute, and from legislatively declared purposes, rather than attempting to divine their meaning in isolation. Each of those metrics point to a single answer consistent with the decision below.

Still, another background principle critical to the interpretive enterprise is the federal-state balance struck by our Constitution. Respect for state sovereignty requires that the historic relationship between state and federal courts in the administration of justice continue unimpaired so that state courts may try state cases free from federal court interruption. It further counsels that intrusion in state law issues adjudicated in state courts may only occur when Congress has explicitly authorized it. Here, that authorization is wanting.

Nor should a departure from those venerable principles be authorized on the basis of imagined concerns about the bias or competence of state courts. This Court has repeatedly rejected suggestions that

state courts cannot operate fairly and independently for good reason. Modern experience in state courts demonstrate their professionalism, neutrality, and impartiality. More importantly, disrespect for state courts, which handle the overwhelming majority of the Nation's disputes, runs counter to the balance struck by the Constitution.

Practical reasons also support keeping the limits on interlocutory appeals intact when a district court orders a remand. No reasonably competent lawyer would fail to find a federal-officer hook to assure immediate appeal of a remand order where some other ground provides a more colorable basis for removal. Sanctions are wholly inadequate to deter this type of gamesmanship, as experience demonstrates. Given that Petitioners' only rationale for a more plenary appeal focuses myopically on the word "order" in splendid isolation from the remainder of the statute, a ruling based on the word "order" would encourage federal district court judges to issue separate decisions on federal-officer removal and on all other asserted bases for removal in an unnecessary series of judicial gymnastics as a means of responding in kind to the type of abuse Petitioners' approach would encourage.

Petitioners have also briefed the other issues that they believe would allow them to remain in federal court, though they did not include those issues in any Question Presented. Their absence in the Petition and the Fourth Circuit's decision ought to encourage this Court to decline to address them.

However, if this Court were to take up the other claimed bases for removal, State and Local Government *Amici* suggest that they lack merit. Petitioners and their *amici* recognize that the Clean Air Act supplanted their assertion of federal common law, yet still hold out a false hope that its one-time existence might render the plainly state law issues presented in this lawsuit to be "uniquely federal" so that it might be said that they arise under federal law. However, as this Court has acknowledged, the displacement of federal common law has provided a space that state law may properly fill, if not otherwise preempted. Here, that preemption is lacking, as the Congress respected the federal-state balance demanded by the Constitution.

In the end, neither the federal issues raised, insubstantial at best or nonexistent at worst, and the attenuated claims of preemption provide no warrant to justify the assertion of federal jurisdiction. This Court should affirm the Fourth Circuit.

ARGUMENT

I. FEDERALISM PRINCIPLES REQUIRE THAT APPELLATE REVIEW OF A DISTRICT COURT'S REMAND ORDER BE LIMITED TO THE ISSUE CONGRESS EXPRESSLY AUTHORIZED.

The Fourth Circuit correctly held that 28 U.S.C. § 1447(d) makes federal-officer removal alone (or, in other cases, the civil-right removal alone) subject to appellate review, not the seven other grounds for

removal raised by Petitioners, even though the district court rejected them all in a single remand order. Pet. App. 10a. Although the Fourth Circuit relied on its own precedent, *Noel v. McCain*, 538 F.2d 633 (4th Cir. 1976), and found that neither this Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), nor the Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545 (codified in various sections of 28 U.S.C.), impaired *Noel*, State and Local Government *Amici* suggest that the principles animating our federalist system also support the same conclusion in light of the statutory text and legislative history.

A. Applicable Canons of Statutory Construction Support the Result Reached by the Fourth Circuit, and Congress Ratified that Interpretation in Adding Federal-Officer Removal to the Statute.

Appellate review of remand orders is generally barred with two strictly limited exceptions. 28 U.S.C. § 1447(d). Under those exceptions, an appellate court has jurisdiction to review whether a case was properly removed under 28 U.S.C. § 1443 (civil rights removal provision) or 28 U.S.C. § 1442(a)(1) (federal officer removal provision). The federal-officer removal provision was added in the Removal Clarification Act of 2011, although removal on these grounds has a long pedigree.[2] The 2011 Act simply added the words "1442 or" into Section 1447(d) so that the section now reads:

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[2] Federal officer removal was brought into being in 1815 as a "congressional response to New England's opposition to the War

> 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.

When undertaking to construe a statute, this Court seeks to read the statutory scheme as "coherent and consistent." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008). Doing so avoids "interpretations of a statute which would produce absurd results," particularly when "alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). In order to render a coherent and consistent interpretation, one canon of statutory construction, *noscitur a sociis,* "holds that a word is known by the company it keeps." *Babbitt v. Sweet Home Chap. of Communities for a Great Oregon*, 515 U.S. 687, 694 (1995). It is a "commonsense canon," "which counsels that a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). In that sense, it "applies to sections and sentences in a manner similar to how the doctrine of in pari materia

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of 1812," was expanded "in response to South Carolina's 1833 threats of nullification" and again during the Civil War era, and finally "took its present form encompassing all federal officers" in the Judicial Code of 1948. *Mesa v. California*, 489 U.S. 121, 125-26 (1989). Removal to federal court seeks to avoid potential state-court hostility to federal authority. *Willingham v. Morgan*, 395 U.S. 402, 405 (1969).

applies to statutes covering the same subject matter." 2A Sutherland Statutory Construction § 47:16 (7th ed.).

Here, Congress intended the new addition, federal-officer removal, to be treated identically to the preexisting civil rights exception. H.R. Rep. 112-17, at 7 (2011), *reprinted in* 2011 U.S.C.C.A.N. 420, 425 ("Section 2(d) amends Section 1447 by permitting judicial review of Section 1442 cases that are remanded, *just as they are* with civil rights cases.") (emphasis added).

That explicit expression of identical treatment has critically important meaning for application of the statute. Although this Court has not had occasion to address it, the circuits have uniformly held that review of civil-rights removal was limited to that ground alone and not to other bases for the remand order. See *Patel v. Del Taco Inc.*, 446 F.3d 996, 998 (9th Cir. 2006); *Detroit Police Lieutenants & Sergeants Ass'n v. City of Detroit*, 597 F.2d 566, 567-68 (6th Cir. 1979); *Robertson v. Ball*, 534 F.2d 63, 65-66 (5th Cir. 1976); *Noel,* 538 F.2d at 635; *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 533-34 (6th Cir. 1970); *Pennsylvania ex rel. Gittman v. Gittman*, 451 F.2d 155, 156–57 (3d Cir. 1971).

The consistent construction of when a remand order may be reviewed under the civil-rights exception informs and mandates the same interpretation of federal-officer removal. This Court presumes that Congress is aware of a "judicial interpretation of a statute and . . . adopt[s] that interpretation when it re-

enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Moreover, "[w]hen Congress amend[s an Act] without altering the text of [the relevant provision], it implicitly adopt[s this Court's] construction" of that provision. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244 n.11 (2009). See also *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 176 (2005) (holding it "not only appropriate but also realistic to presume that Congress was thoroughly familiar with [earlier precedent] and . . . expected its enactment . . . to be interpreted in conformity with it.").

The presumption of reenacting an existing interpretation also applies when "Congress adopts a new law incorporating sections of a prior law," so that the "interpretation given to the incorporated law, at least insofar as it affects the new statute," continues. *Lorillard*, 434 U.S. at 581. In this instance, the underlying law was not changed. Instead, another exception was added to the preexisting one with the addition of two simple words, clearly and indisputably signaling congressional intent to treat federal-officer removal precisely the same way as the civil-rights exception was treated, just as it declared in the House Report. There is every reason to adhere to the prior interpretation by the circuits, having both survived the test of time and having received subsequent congressional ratification.

B. Federalism Principles Add a Heavy Thumb on the Scale, Supporting the Fourth Circuit's Decision.

Another of the "background principles of construction that our cases have recognized are those grounded in the relationship between the Federal Government and the States under our Constitution." *Bond v. United States*, 572 U.S. 844, 857-58 (2014). This Court has mandated that "[s]tatutes conferring federal jurisdiction . . . be read with sensitivity to 'federal-state relations.'" *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 423 (2010) (citation omitted). Respecting that relationship, this Court has insisted on the "well-established principle" that Congress be explicit in conveying its intent to change the "usual constitutional balance of federal and state powers" or "'radically readjust[ ] the balance of state and national authority,'" *Bond*, 572 U.S. at 858 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) and *BFP v. Resolution Trust Corporation,* 511 U.S. 531, 544 (1994)).

Not only has Congress not expressed any such intent, it plainly indicated the opposite. The limited review explicitly authorized by § 1447(d) preserves the federalism balance Congress sought to maintain when it authorized appellate review of federal-officer removal under 28 U.S.C. § 1442. Just as preemption analysis "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system," *Alessi v. Raybestos–Manhattan, Inc.*, 451 U.S. 504, 522 (1981), removal of a case from the authority of a state court must demonstrate a high

degree of deference to the sovereign authority that resides in the States.

For that reason, Congress only intrudes upon the "power reserved to the states under the Constitution to provide for the determination of controversies in their courts," through the most explicit exercise of its authority over federal jurisdiction. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). The required "'[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.'" *Id*. at 109 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)). See also *City of Greenwood v. Peacock*, 384 U.S. 808, 831 (1966) ("[T]he provisions of § 1443(1) do not operate to work a wholesale dislocation of the historic relationship between the state and the federal courts in the administration of the . . . law.").

Indeed, "[s]ince the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." *Younger v. Harris*, 401 U.S. 37, 43 (1971). The *Younger* Court detailed that Anti-Injunction Act, 28 U.S.C. § 2283, had a 1793 predecessor, reflecting a constitutional predisposition[3] to allow state courts to

[3] "Early congressional enactments provid[e] contemporaneous and weighty evidence of the Constitution's meaning." *Printz v. United States*, 521 U.S. 898, 905 (1997) (citation and internal quotation marks omitted; ellipsis in orig.).

operate without significant intrusion by federal judicial authority.

The same federalism principles motivated the Removal Clarification Act of 2011, through which Congress specifically sought to protect federal officers from being haled into state courts under state law. H.R. Rep. 112-17, at 3, 2011 U.S.C.C.A.N. at 422 ("The purpose of the law is to take from state courts the 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."). Far from expanding the scope of appellate review to entire remand orders, an expansion that would tip the federalist scale in significant and unpredictable ways, Congress's amendment of the removal procedure statute was concerned with *preserving* the existing balance of power between state and federal courts in cases involving federal officers.

C. Practical Reasons and the Unquestioned Fairness and Competence of State Courts Also Support Remand.

While preserving the federal-state balance is sufficient as a constitutional matter to affirm the decision below, practical reasons also support the distinction Congress drew and the Fourth Circuit understood. Congress has long understood that the federal courts operate under extraordinarily heavy caseloads. See Andrew Kragie, "Key Senators Want to Add New Federal Judgeships This Year," Law360 (Jun. 30, 2020). Still, the most recent omnibus judgeship bill was the Federal Judgeship Act of 1990,

P.L. 101-650, which created 61 permanent and 13 temporary district court judgeships. The federal judiciary recommended in 2019 that 73 new district court judgeships be created to address the proliferation of federal litigation. See Kragie, *supra*.

The federal caseload continues to increase. The Administrative Office of the Courts, in its 2020 report, noted that civil filings increased 16 percent (up 46,443 cases) to 332,732. Federal Judicial Caseload Statistics 2020, available at https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020. Diversity jurisdiction accounted for 140,812 new filings, a 49 percent increase. *Id*. The increase in federal district court cases that could result from appellate review of remand decisions further supports a reading of § 1447(d) that presumes Congress would not have impliedly added to federal litigation burdens, particularly given that it is something that traditionally has required conscious and explicit legislative action.

At the same time, the vast bulk of the Nation's judicial business is handled properly and well in the state courts. For 2018, the most recent year for which data is available, the National Center for State Courts reports that civil filings increased by more than 500,000. National Center for State Courts Court Statistics Project, State Court Caseload Digest 2018 Data, at 9 (2020). This constitutes a more than tenfold increase as compared to the federal caseload – and an increase by itself that is larger than the entire existing federal caseload.

Just recently, this Court again discussed the existing "system of 'cooperative judicial federalism,' [which] presumes federal and state courts alike are competent to apply federal and state law." *McKesson v. Doe*, No. 19-1108, 2020 WL 6385692, at *2 (U.S. Nov. 2, 2020) (citation omitted). Indeed, this Court has held that there is no inherent incompatibility between state court jurisdiction and federal interests. *Tafflin v. Levitt*, 493 U.S. 455, 464 (1990). While Petitioners and their *amici* urge this Court to look askance at state courts' capability of handling potentially complex litigation, a "doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997). Any suggestion of inability or prejudice should be rejected as presumptively invalid.

As separate sovereigns and with "[d]ue regard [to] the rightful independence of state governments," this Court has repeatedly recognized "the power of the States to provide for the determination of controversies in their courts." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1573 (2016) (citations and internal quotation marks omitted). For that reason, this Court has expressed a "deeply felt and traditional reluctance . . . to expand the jurisdiction of federal courts through a broad reading of jurisdictional statutes." *Id.* (citations and internal quotation marks omitted). It is an "interpretive stance [that] serves, among other things, to keep state-law actions . . . in state court, and thus to help maintain the constitutional balance between state and federal judiciaries." *Id.* And it is an

interpretative stance fully applicable here to accomplish the same purpose.

Petitioners and their *amici* denigrate state courts without basis, but their speculative claims of "local prejudice," Pet. Br. 29, provide no warrant for removal. Congress has not sought to deny state courts their authority to determine disputes by explicit legislation on that basis, see *Shamrock Oil*, 313 U.S. at 108-09. The complaint expressed generically by Petitioners runs counter to modern experience with state courts. More importantly, it runs counter to the balance struck by the Constitution.

II. THE CONSTRUCTION GIVEN § 1447(d) BY PETITIONERS AND THEIR *AMICI* DEFIES CONGRESSIONAL INTENT AND COMMON SENSE AND WOULD OPEN THE DOOR TO GAMESMANSHIP.

Petitioners and their *amici* focus myopically on the word "order" to render Congress's expressed purpose and the traditional canons of construction a nullity, while also turning their backs on the important federal-state balance that necessarily informs the interpretative exercise. It is nonsensical to allow the purposes of the limitation on appeals of remand orders to be defeated in its entirety by taking a single word out of its established context.

Instead, this Court has insisted that courts "interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" *Abramski v. United States*, 573

U.S. 169, 179 (2014) (quoting *Maracich v. Spears*, 570 U.S. 48, 76 (2013)). Those well-used tools of statutory construction combine with common sense to assure that statutory terms are construed fairly. *Id*.

In contrast, Petitioners and its *amici*, rely heavily on the *Lu Junhong v. Boeing Co*., 792 F.3d 805 (7th Cir. 2015), to give the word "order" the broader scope they favor. Yet, *Lu Junhong* did not undertake the contextual, structural, historical, and purposeful analysis this Court has mandated. Instead, it looked to extraneous statutes for the meaning of the term, ignoring the most obvious references points that come from the interpretation and application of the civil-rights exception in the same statute.

For example, *Lu Junhong*, like Petitioners and its *amici*, read the Class Action Fairness Act (CAFA), which "authorizes appellate review of remands of cases that had been removed under its auspices," to permit review of all bases for federal jurisdiction. *Id.* at 811. While some circuits have read CAFA to allow for broader review, other courts have correctly determined that "jurisdiction to review a CAFA remand order stops at the edge of the CAFA portion of the order." *City of Walker v. Louisiana through Dep't of Transp. & Dev.,* 877 F.3d 563, 567 (5th Cir. 2017). See also *Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224, 1229 (8th Cir. 2012).

Lu Junhong proclaimed its approach "entirely textual." 792 F.3d at 812. Yet, as Justice Scalia once noted that, "while the good textualist is not a literalist, neither is he a nihilist." Antonin Scalia, A Matter of

Interpretation 24 (1997). *Lu Junhong*, remarkably, achieves both disfavored labels in the service of textualism. It makes "order" the whole document that contains the order, ignoring context, usage, congressional intent, and ratification, thereby adopting a literalism that simultaneously destroys the statutory scheme Congress plainly put in place.

Nevertheless, *Lu Junhong* recognizes that its construction could be problematic. It understands that "[s]ome litigants may cite § 1442 or § 1443 in a notice of removal when all they really want is a hook to allow appeal of some different subject." *Lu Junhong*, 792 F.3d at 813. It then confidently posits that "a frivolous removal leads to sanctions, potentially including fee-shifting," which it deems sufficient to deter that type of gamesmanship. *Id.*

Experience, however, has demonstrated that the court's confidence was misplaced. The defendant, a private aircraft manufacturer, claimed it became a federal officer because it had received a designation from Federal Aviation Administration that allowed it to self-certify the airworthiness of its planes. The Seventh Circuit not only had little difficulty in rejecting the argument that self-certification transforms a private actor into a federal officer, but deemed it "frivolous for Boeing or a similarly-situated defendant to invoke § 1442 as a basis of removal" "*after today*." *Id.* (emphasis added). Yet, that explicit admonition has not stopped the exact same argument that the Seventh Circuit deemed a frivolous attempt to assert federal-officer removal from being repeated in other courts. *See, e.g., Riggs v. Airbus Helicopters,*

Inc., 939 F.3d 981 (9th Cir. 2019), *cert. denied*, No. 19-1158, 2020 WL 3492671 (U.S. June 29, 2020).

Sanctions have not followed. Courts are understandably reluctant to impose sanctions, so the remedy the Seventh Circuit imagined is actually a toothless deterrent. In fact, in this Court's leading case on the basis for federal-officer removal, it made clear that this category of removal was unavailable just because the private party is part of a heavily regulated industry. *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 153 (2007) ("a highly regulated firm cannot find a statutory basis for removal in the fact of federal regulation alone."). Despite that clarion declaration more than a decade ago, a defendant in a case now on appeal to the Third Circuit has indeed argued that, as a nursing home, it is "required to comply with detailed federal regulations when operating these facilities and when providing care," and that "by providing medical treatment for patients, complying with Medicare and Medicaid regulations, and therefore receiving Medicare and Medicaid payments from the federal government, they were assisting a federal officer in the performance of an official duty." *Estate of Maglioli v. Andover Subacute Rehab. Ctr. I*, No. CV 20-6605 (KM)(ESK), 2020 WL 4671091, at *12 (D.N.J. Aug. 12, 2020), *appeal pending,* No. 20-2834 (3d Cir.). The district court had no difficulty applying *Watson* to reject the contention that the nursing home was a federal officer because of regulatory compliance. *Id.* at *13. Nonetheless, an appeal, not sanctions, followed.

Prudential reasons, then, further support limiting review to the federal-officer grounds. If alleging federal-officer removal opens the door to appellate review of all other asserted bases for removal, no lawyer would neglect to find a defensible, if inadequate, way to assert that peculiar form of removal to avoid the bar on interlocutory appeal for all other justifications for removal. As a result, the exception (federal-officer removal) would swallow the rule against interlocutory review of removal generally, highlighting the concerns articulated by the various circuits about appellate delay.

Finding a faintly colorable ground to assert federal officer removal under those circumstances is a form of gamesmanship that this Court has discouraged for, among other things, its sapping of judicial resources, *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). In response, it would encourage similar ploys by district court judges. Under Petitioners' approach to the word "order," divorced from all context, a district court judge seeing no real colorable grounds for federal-officer removal, could defeat plenary review by issuing separate orders. One "order" would deny the appeal on the non-federal-officer grounds asserted, while noting a further motion is pending. A second "order' could then find federal-officer removal wanting and remand the case to state court. Under Petitioners' literalist approach, the order rejecting federal-officer removal stands alone and would not admit of an appeal on any other ground.

Still, there is no reason why district court judges should need to jump through such unseemly hoops,

because Congress made clear its intent to limit appellate review to federal-officer grounds, rather than make clear its insistence that all grounds be reviewable immediately when mentioned in a single document. When Congress wants immediate appellate review, it knows how to do so. It did not do so here.

III. THERE ARE NO "UNIQUELY FEDERAL INTERESTS" AT STAKE IN THIS CASE SUFFICIENT TO REQUIRE CONVERSION OF PLAINTIFF'S STATE LAW CLAIMS INTO FEDERAL LAW CLAIMS OR TO CONFER FEDERAL JURISDICTION.

Defendants attempt to wedge the federal door open with federal-officer removal to allow appeal of removal grounds that are not reviewable and argue those other issues here, but this Court should consider only the meritless claim of whether other grounds for removal are appealable under Section 1447(d). This Court normally does not reach other issues not fairly embraced by the Question Presented, *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 398 (1979), or that were not decided by the court below. *National Collegiate Athletic Ass'n v. Smith,* 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below"). It should not undertake to decide either here.

A. The Case Presents Issues that Properly Arise under State Law.

If this Court does reach the other grounds for removal, Petitioner presents no other proper basis to

be in federal court. The state authority that Baltimore seeks to advance in its lawsuit "falls within the exercise of even the most traditional concept of what is compendiously known as the police power." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960). Municipal police power, as exercised here, embodies a local government's ability to issue regulations and take actions for the benefit of the public's health, safety, and welfare. See generally 6A McQuillin Mun. Corp. § 24:1 (3d ed. 2015). The "'historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Arizona v. United States*, 567 U.S. 387, 400 (2012) (citation omitted). No such congressional purpose is articulated here on any of the grounds advanced by Petitioners or its *amici*.

Despite some transboundary aspects of the underlying issue, no "uniquely federal interests" arise in this case that require that the traditional basis for the state law claims be transmuted into a federal one by some act of alchemy. This Court has described cases involving such "uniquely federal interests" as those "narrow areas [that are] . . . concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (citation omitted). This case invokes none of those concerns.

B. The Case Presents *No* Issues that Arise under Federal Law.

This conclusion that no federal concerns arise holds true even as Petitioners seek to reframe Baltimore's claims as "arising under" federal common law, as raising disputed and substantial federal issues, or as being completely preempted. The first two arguments are masks for more straightforward preemption arguments properly addressed by state courts, *see Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Calif.*, 463 U.S. 1, 14 (1983) (ordinary preemption provides no basis for removal, even if it is the only issue); and the last argument is simply wrong.

Federal-question jurisdiction is premised on cases "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Its purpose is a practical one, allowing federal courts to fashion a uniform law for what is indisputably federal in nature. Under the test this Court adopted, the focus remains on the plaintiff's "well-pleaded complaint." *Franchise Tax Bd.*, 463 U.S. at 9-10. The "vast majority of cases" qualifying as "arising under" "are those in which federal law creates the cause of action." *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986). "Arising under" jurisdiction may also exist "where the vindication of a right under state law necessarily turned on some construction of federal law." *Franchise Tax Bd.*, 463 U.S. at 9. Here, the complaint raises no federal issue of any kind, and Petitioner points to no explicit invocation of federal law.

Petitioner instead asserts that the lawsuit implicates federal common law as its justification for removal. While federal common law can provide a basis for removal, *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972), Baltimore's public nuisance claim exists entirely under state law and does not implicate federal law. See Pet. App. 44a. Instead, Petitioner's assertion that "uniquely federal interests" are implicated (Pet. Br. 38), seems reminiscent of some aspects of the argument this Court heard and rejected in *Thompson*. There, a drug manufacturer argued that unique federal interests in regulating pharmaceutical products required removal a lawsuit in which the state cause of action made a violation of a federal statute one of its elements.

In evaluating the claim, this Court reiterated that the "mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Thompson*, 478 U.S. at 813 (footnote omitted). The Court went on to state that, because Congress chose "no federal remedy for the violation of this federal statute," that was "tantamount to a congressional conclusion" that the "claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Id*. at 814.

To the manufacturer's argument that federal jurisdiction was necessary to serve purposes of uniformity in determining violations of federal law, this Court said that that was nothing more than a preemption argument, ultimately reviewable in this Court, and that is cannot overcome the fact that

Congress did not establish original jurisdiction for such claims in federal court. *Id.* at 815. Finally, this Court held that the novelty of the federal issue in the state lawsuit was also "not sufficient to give it status as a federal cause of action; nor should it be sufficient to give a state-based FDCA claim status as a jurisdiction-triggering federal question." *Id.* at 817 (footnote omitted).

Here, as in this ruling in *Thompson*, federal common law was displaced by statute, in this instance by the Clean Air Act. *American Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 424 (2011) (*AEP*). The *AEP* Court understood that the state law claims were potentially subject to preemption under the federal statute, but were not supplanted and thus provided no basis for federal removal. *Id.* at 429. No federal common law basis for removal thus exists.

Federalism concerns should also guide this Court's decision on "arising under" jurisdiction. This Court, in denying another "arising under" claim, made an apt observation: "it is hardly apparent why a proper 'federal-state balance,' would place such a nonstatutory issue under the complete governance of federal law, to be declared in a federal forum." *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 701 (2006). In fact, the reasoning underlying Petitioners' argument that "uniquely federal interests" justify removal would, if adopted by this Court, pose a risk to States, counties, and cities across the country. If endorsed, such reasoning could empower federal common law to hold dominion over a broad swath of policy areas committed to the States

and their subdivisions, and federal courts to claim jurisdiction over a wide array of state law claims, subverting state and local governments' ability to rely on traditional legal tools in state courts to pursue remedies for harms they are obliged to address for their citizenry. As this Court stated in *McVeigh*, the "state court in which th[is] . . . suit was lodged is competent to apply federal law, to the extent it is relevant." *Id*. There is no appropriate role in it for a federal district court.

Finally, complete preemption plainly does not apply. Under complete preemption, a complaint purporting to rest on state law . . . can be recharacterized as one 'arising under' federal law if the law governing the complaint is exclusively federal." *Vaden v. Discover Bank*, 556 U.S. 49, 61 (2009). It exists in only rare circumstances where "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). That unusually powerful form of preemption requires the "clearly manifested intent of Congress." *Metro. Life*, 481 U.S. at 67. That intent is plainly absent here.

IV. THE DISPLACEMENT OF A FEDERAL COMMON LAW CAUSE OF ACTION FOR NUISANCE BY STATUTE REQUIRES THE STATE LAW CAUSE OF ACTION BE TREATED ON ITS OWN TERMS.

All parties acknowledge that the federal common law still claimed by Petitioners was displaced by the Clean Air Act, as this Court held in *AEP,* 564 U.S. at 424. When that type of displacement occurs it "extends to all remedies," including damages. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012). Neither *AEP,* nor its further explication in *Kivalina,* made any suggestion that a public nuisance claim based on state law was foreclosed, or that state courts were not available to adjudicate such a claim.

Rather, they did just the opposite. This Court's express view is that the existence of a federal common law claim that has been displaced by federal legislation does *not* erase the possibility of state law claims; rather, it converts the availability of state claims into an ordinary question of statutory preemption. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 327-29 (1981); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987). Accordingly, the unanimous *AEP* court, held, "[i]n light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." *AEP*, 564 U.S. at 429. *See also Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 690 (6th Cir. 2015), and *Little v. Louisville Gas & Elec. Co.*, 805 F.3d 695, 698 (6th Cir. 2015)

(state common law nuisance for interstate pollution not preempted by Clean Air Act).

Kivalina further supports proceeding with the state law claims in state court. Discussing the supplemental state law claims filed there, the Ninth Circuit noted that the district court had declined to exercise supplemental jurisdiction and dismissed the claim without prejudice to re-file in state court. 696 F.3d at 854-55. *See also Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 882 (N.D. Cal. 2009) (stating that a federal court "may decline to exercise supplemental jurisdiction over a claim if it has dismissed all claims over which it has original jurisdiction"), *aff'd* 696 F.3d 849, 857 (9th Cir. 2012); *Alexandria Resident Council, Inc. v. Alexandria Redevelopment & Hous. Auth.*, 11 Fed. App'x 283, 287 (4th Cir. 2001) ("Although a federal court has discretion to assert pendent jurisdiction over state claims even when no federal claims remain, . . . certainly if the federal claims are dismissed before trial ... the state claims should be dismissed without prejudice. . . . For, when all federal claims are dismissed early in the litigation, the justifications behind pendent jurisdiction—considerations of judicial economy, convenience and fairness to litigants—are typically absent." (citations omitted)).

The concurrence in *Kivalina* stated unequivocally that "[d]isplacement of the federal common law does not leave those injured . . . without a remedy," and suggested state nuisance law as "an available option to the extent it is not preempted by federal law." 696

F.3d at 866 (Pro, J., concurring). Here, preemption does not exist. Yet, even if it did, state courts are perfectly capable of adjudicating that issue. Preemption is a defense to state law claims and cannot provide the basis for federal-court jurisdiction. *Franchise Tax Bd,* 463 U.S. at 14.

The clear differences between federal law and state public nuisance law is also evident in the original Fifth Circuit panel's 2009 opinion in *Comer v. Murphy Oil USA*, 585 F.3d 855, 860 (5th Cir. 2009) (*Comer I*), *petition for writ of mandamus denied sub nom. In re Comer*, 562 U.S. 1133 (2011). In *Comer I*, plaintiffs seeking damages for injuries suffered as a result of Hurricane Katrina had invoked federal jurisdiction based on diversity. The Fifth Circuit panel found that a diversity suit brought under state law for damages was materially distinguishable from public nuisance claims brought under federal law and sustained the claims. *Id*. at 878-79. (The decision was subsequently vacated when the Fifth Circuit granted rehearing *en banc*; the Fifth Circuit then failed to muster a quorum for the rehearing, thereby effectively reinstating the district court's decision as a matter of law. *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010) (*Comer II*)).

The weight of precedent is overwhelming that Baltimore has stated a plainly state law claim over which state courts hold jurisdiction. Petitioners' argument that state law claims challenging one set of behaviors (failure to warn and deceptive marketing coupled with a disinformation campaign) should be converted into a federal law claim challenging another

set of behaviors (combustion of the product and emission of greenhouse gases) should be rejected. Even if this Court were to accept that there is a federal common law claim that could apply in this context, its displacement by statute would demand the state law claims be heard on their own terms, and that *all* arguments about preemption, other than the inapt assertion of complete preemption, be heard in state court.

CONCLUSION

For the foregoing reasons, State and Local Government *Amici* urge this Court to affirm the Fourth Circuit's decision that federal-officer removal does not provide plenary review of all grounds for removal and, if reaching other issues, that the case should be remanded to state court.

Respectfully submitted,

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