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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

STATUTES

OTHER AUTHORITIES

INTERESTS OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

One of the Chamber's important functions is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community. The Chamber filed *amicus* briefs in the court below and in several other pending cases raising the same issue of appellate procedure. See *Bd. of Cty. Comm'rs* v. *Suncor Energy (U.S.A.), Inc.*, No. 19-1330 (10th Cir. docketed Sept. 9, 2019); *Rhode Island* v. *Shell Oil Prods. Co.*, No. 19-1818 (1st Cir. docketed Aug. 20, 2019); *Cty. of San Mateo* v. *Chevron Corp.*, No. 18-15499 (9th Cir. docketed Mar. 27, 2018).

The question presented here—whether appellate review of an order remanding a case removed on federal-officer or civil-rights grounds includes any other grounds for removal addressed in the remand order—is important to the nation's business community far beyond the specifics of this case or even climate-

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[1] Counsel for all parties have received notice of *amicus*'s intent to file this brief and have consented to its filing. No counsel for any party authored this brief in whole or in part, and no entity or person other than *amicus* and its members and counsel made a monetary contribution intended to fund the preparation or submission of this brief.

change litigation in general. The Chamber's members often serve as federal contractors or otherwise work closely with federal agencies and officials—particularly during times of national emergency, such as the current pandemic. Indeed, as present circumstances make tragically clear, private industry is often the most efficient way for the federal government to obtain important goods and services, including goods and services the government would otherwise have to produce itself. If companies are sued in state court for these activities, they will often remove the litigation to federal court before asserting federal-law defenses like preemption or the government contractor defense, see *Boyle* v. *United Techs. Corp.*, 487 U.S. 500 (1988). Businesses are also the usual targets of class actions that involve similar removal and scope-of-appeal issues. The nation's businesses thus have a strong interest in ensuring that cases that belong in federal court stay there.

That interest—and important judicial interests in accuracy, efficiency, and restraint—are disserved by the Fourth Circuit's rule, which restricts appellate review to the specific ground that authorized the appeal (here, federal-officer removal). As this case shows, such litigation often involves several grounds for removal, including general federal-question jurisdiction. Yet the decision below precludes review of these other jurisdictional bases—and thus insulates from reversal a decision that correctly rejects federal-officer removal but wrongly rejects a different, valid basis for jurisdiction. The Chamber urges the Court to review and reverse that decision so that its members not only have their day in court, but have their day in the *right* court.

SUMMARY OF ARGUMENT

The Fourth Circuit held that an appeal under 28 U.S.C. § 1447(d) is limited to the federal-officer or civil-rights removal ground that authorized the appeal, and reaches no other ground for removal the defendant raised, no matter how meritorious. That result is not just contrary to text and precedent, as the petition explains. It also clashes with important systemic interests, departs from federal appellate procedure in analogous contexts, and impairs defendants' removal rights.

I. Reviewing an entire remand order ensures that properly removed cases stay in federal court and improperly removed ones do not. Indeed, the Fourth Circuit's rule necessarily matters *only* where the district court correctly rejected federal-officer or civil-rights grounds for removal but incorrectly rejected a different, independent ground. Complete appellate review thus ensures that the courts of appeals will correct erroneous judgments—which is their basic function—while the decision below allows mistaken remands to escape correction. Complete review also allows the appellate courts to decide cases based on the firmest ground for decision, while limited review may force them to grapple unnecessarily with difficult or novel jurisdictional issues.

Complete review furthers these important purposes without hindering any countervailing interest. Once a decision is already appealable, reviewing the entire remand order adds little if any delay. And experience has not borne out speculative claims that complete review will encourage baseless removal arguments. So, when Congress has authorized an appeal of a remand order, there is no reason to bar the appellate courts from reviewing the entire order.

II. Complete review is also the norm. A federal appellate court's usual task is to review the judgment below, not the lower court's reasoning. Even where an interlocutory or limited appeal is authorized for a particular reason, appellate review commonly reaches further. In certified-question cases, in class-action removals, in preliminary-injunction appeals, and in collateral-order and pendent-appellate-jurisdiction cases, review extends beyond the specific ground that authorized the appeal, often reaching the entire order under review. There is no basis to depart from this norm in the removal context.

III. This issue is important to the nation's business community. Businesses are often the defendants in cases subject to removal—and appeal—on federal-officer or class-action grounds. And as this case shows, such litigation often involves multiple independent grounds for removal, like federal-question or diversity jurisdiction. These interlocking pieces of the federal jurisdictional scheme together protect defendants from in-state or anti-federal bias and ensure a federal forum for important national issues. In turn, complete review of remand orders vindicates defendants' removal rights under these provisions, while the decision below gives those rights short shrift.

ARGUMENT

The decision below holds that an appeal under § 1447(d) "is confined to" the specific federal-officer or civil-rights ground that authorized the appeal, and "does not extend to the . . . other grounds for removal raised by" the defendant, "even though the district court rejected them in the same remand order." Pet. App. 7a. That holding flouts § 1774(d)'s clear textual command and this Court's precedent, as the petition

explains. Pet. 17–20. The Chamber writes to underscore that complete review of remand orders in these cases (i) serves important values of accuracy and judicial restraint without hindering the policy behind § 1447(d)'s general bar on remand appeals; (ii) tracks federal appellate procedure in similar contexts; and (iii) vindicates the removal rights Congress conferred on defendants, including members of the nation's business community.

I. COMPLETE APPELLATE REVIEW IMPROVES JUDICIAL DECISIONS WITHOUT ENCOURAGING DELAY OR BASELESS REMOVALS.

The most important reason to allow complete appellate review of remand orders is obvious: It enables the courts of appeals to correct otherwise-dispositive errors. For example, if a defendant removes a case on federal-officer and federal-question grounds, and the district court correctly rejects the first but wrongly rejects the second, complete review will ensure that the case is ultimately litigated in federal court, where it belongs. Conversely, under the decision below, the case will be litigated in state court even though the district court had federal-question jurisdiction and the defendant had a statutory right to defend the case in federal court. Indeed, the Fourth Circuit's rule matters *only* if the district court incorrectly rejects an independent basis for removal—and in these cases, the rule is decisive. This rule thus prevents the courts of appeals from discharging their most basic responsibility: To determine whether a "legal error resulted in an erroneous judgment." *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

To be sure, other values sometimes outweigh the interest in error correction. Congress has barred appeals of most remand orders "to spare the parties interruption of the litigation and undue delay in reaching the merits of the dispute." 14C Charles Alan Wright et al., *Federal Practice and Procedure* § 3740 (rev. 4th ed. 2018); see *Kircher* v. *Putnam Funds Tr.*, 547 U.S. 633, 640 (2006). "Since the suit must be litigated somewhere, it is usually best to get on with the main event." *Lu Junhong* v. *Boeing Co.*, 792 F.3d 805, 813 (7th Cir. 2015).

But this interest in avoiding delay does not apply when Congress has already authorized an appeal, as in federal-officer and civil-rights cases. "Once an appeal is taken there is very little to be gained by limiting review . . . ." 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.11 (2d ed. 1992). Since some delay is inevitable, the "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. In this situation, the main benefit of complete review—ensuring that the remand order is correct—far outweighs any residual benefit of narrowing it.

Complete review also simplifies some appeals. Consider again the case removed on federal-officer and federal-question grounds. If federal-officer jurisdiction depends on a novel or difficult legal issue, and the federal-question ground turns out to be more straightforward, judicial restraint favors reversal on the narrower ground. Complete review thus allows appellate courts to avoid grappling with thorny jurisdictional issues unnecessarily. Cf. *Dames & Moore* v. *Regan*, 453 U.S. 654, 660 (1981) (noting "the necessity to rest de-

cision on the narrowest possible ground capable of deciding the case"). On the other hand, if briefing and argument reveal that the federal-officer ground is more clearly meritorious, the Court need not reach the other issues.

There is no reason to think that complete review "will encourage defendants to rely on strained [federal-officer or civil-rights] arguments . . . in an effort to support appeal on other grounds." 15A Wright et al., *supra*, § 3914.11. First, as the leading treatise recognizes, "[s]ufficient sanctions are available to deter frivolous removal arguments that this fear should be put aside." *Id.*; see also *Lu Junhong*, 792 F.3d at 813 (noting that "a frivolous removal leads to sanctions").

Second, experience has not borne out this concern. The Seventh Circuit has allowed complete review for at least five years (and maybe as long as fifteen years). See *Lu Junhong*, 792 F.3d at 811 (discussing *Brill* v. *Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005)). And the Sixth Circuit has allowed it for almost three years. See *Mays* v. *City of Flint*, 871 F.3d 437 (6th Cir. 2017). These decisions have not created a flood of strained or frivolous federal-officer or civil-rights arguments.

In the Seventh Circuit, for example, in two appeals after *Lu Junhong* the court *reversed* the remand order because the federal-officer arguments were meritorious. See *Hammer* v. *U.S. Dep't of Health & Human Servs.*, 905 F.3d 517, 528, 530 (7th Cir. 2018); *Betzner* v. *Boeing Co.*, 910 F.3d 1010, 1013, 1015 (7th Cir. 2018). And in one case, although the court rejected all asserted jurisdictional grounds, including the federal-officer argument, it acknowledged that there were "indeed cases supporting" the defendant's removal the-

ory, and did not suggest that the argument was frivolous. See *Panther Brands, LLC* v. *Indy Racing League, LLC*, 827 F.3d 586, 590 (7th Cir. 2016).

In Sixth Circuit cases after *Mays* where removal was disputed, the defendant removed solely on meritorious federal-officer grounds, *Abernathy* v. *Kral*, 779 F. App'x 304, 306 (6th Cir. 2019); *Estate of West* v. *U.S. Dep't of Veterans Affairs*, 895 F.3d 432, 434 (6th Cir.), *cert. denied*, 139 S. Ct. 643 (2018) (mem.); or the defendant removed on federal-question and federal-officer grounds but dropped the federal-question argument on appeal, *Ohio State Chiropractic Ass'n* v. *Humana Health Plan Inc.*, 647 F. App'x 619, 621 & n.1 (6th Cir. 2016); or removal was disputed only on timeliness grounds, *Dernis* v. *Amos Fin.*, 701 F. App'x 449, 452 (6th Cir. 2017); or the appellate court rejected both federal-question and federal-officer grounds based on *Mays* itself, *Nappier* v. *Snyder*, 728 F. App'x 571, 572–73 (6th Cir.), *cert. denied*, 139 S. Ct. 244 (2018) (mem.); *Waid* v. *Busch*, 740 F. App'x 94, 94–95 (6th Cir. 2018) (per curiam); or the defendant removed on both grounds and the court upheld both, *Allen* v. *ABN AMRO Mortg. Grp., Inc.*, 618 F. App'x 823, 826 (6th Cir. 2015). None of these cases says, or suggests, that the defendants were improperly using federal-officer removal as a hook to secure appellate review of a different ground for removal. Not every claim of removal jurisdiction is well-founded, but there is no evidence of a surge in meritless removal arguments in the Sixth and Seventh circuits—and certainly nothing that could outweigh the policies discussed above or § 1447(d)'s clear text.

In short, complete review serves the powerful interest in ensuring that judicial decisions are correct and rest on the firmest available ground. And it neither

impedes the general interest in speedy litigation nor encourages baseless removal arguments. "Review should [thus] be extended to all possible grounds for removal underlying the order," 15A Wright et al., *supra*, § 3914.11, as the statute commands.

II. COMPLETE REVIEW MATCHES FEDERAL APPELLATE PROCEDURE IN SIMILAR CONTEXTS.

It is not unusual for an appeal to bring up for review issues beyond "the precise decision independently subject to appeal." *Swint* v. *Chambers Cty. Comm'n*, 514 U.S. 35, 50 (1995) (collecting examples). That is true both under statutes that authorize appeals of specific rulings—which generally use language echoing § 1447(d)—and under judge-made appellate rules. Sometimes, appellate courts can even review separate orders entered in the same case. Merely allowing them to review an entire order that Congress has made appealable by statute is hardly anomalous.

The basic principle of federal appellate procedure is "review[ ]" of "judgments, not opinions." *Chevron*, 467 U.S. at 842. An appellate court's usual task is to determine whether the lower court made a "legal error [that] resulted in an erroneous judgment." *Id.* Limited-scope appeals are therefore the exception, not the rule. And even then, it is common for the appeal to extend beyond the specific ground that authorized it. Any other rule would create a "substantial risk of producing an advisory opinion": "If nothing turns on the answer to the question [authorizing the appeal], it ought not be answered; on the other hand, once the . . . appeal has been accepted and the case fully briefed, it may be possible to decide the validity of the order without regard to the question that prompted the appeal."

Edwardsville Nat'l Bank & Tr. Co. v. *Marion Labs., Inc.*, 808 F.2d 648, 651 (7th Cir. 1987).

Certified interlocutory appeals are a prime example. The basis for such an appeal is that the district court's "order involves a controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b). But once the district court has certified the appeal, "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." *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 205 (1996). Thus, "the appellate court may address any issue fairly included within the certified order." *Id.*

The same is true for cases removed under the Class Action Fairness Act (CAFA), which, like the language at issue here, creates an exception to the general bar on remand appeals. CAFA provides that, "notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action." 28 U.S.C. § 1453(c)(1). A "straightforward" reading of this language shows that a court of appeals may "consider any potential error in the district court's decision, not just a mistake in application of [CAFA]." *Nevada* v. *Bank of Am. Corp.*, 672 F.3d 661, 672–73 (9th Cir. 2012), *overruled on other grounds by Mississippi ex rel. Hood* v. *AU Optronics Corp.*, 571 U.S. 161, 168 n.4 (2014); accord *Coffey* v. *Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1247 (10th Cir. 2009) (per curiam); *Brill*, 427 F.3d at 451–52.

Likewise, appellate review of the grant or denial of injunctive relief under § 1292(a)(1) "extends to all matters inextricably bound up with the remedial decision . . . . Jurisdiction of the interlocutory appeal is in

large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision . . . ." 20 Charles Alan Wright et al., *Federal Practice and Procedure: Federal Practice Deskbook* § 109 (2d ed. 2011); see, *e.g.*, *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986) (holding that the court of appeals "was justified in proceeding to plenary review" "even though the appeal is from the entry of a preliminary injunction"), *overruled on other grounds by Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833 (1992); *Deckert* v. *Indep. Shares Corp.*, 311 U.S. 282, 287 (1940) (similar). Indeed, this Court long ago held that the "natural meaning" of § 1292(a)(1)'s predecessor provision, which allowed an appeal "from [an] interlocutory order or decree granting or continuing [an] injunction," authorized "an appeal to be taken from the whole of such interlocutory order or decree, and not from that part of it only which grants or continues an injunction." *Smith* v. *Vulcan Iron Works*, 165 U.S. 518, 524–25 (1897).

These examples—certified appeals under § 1292(b), remand appeals under CAFA, and injunction appeals under § 1292(a)(1)—all show that "[w]hen a statute authorizes interlocutory appellate review, it is the district court's entire decision that comes before the court for review." *Brill*, 427 F.3d at 451–52.

An even "broader approach" applies in the collateral-order context. 15A Wright et al., *supra*, § 3911.2. Once the requirements for a collateral order are satisfied, courts take a pragmatic approach to the appeal's scope, permitting "review of related matters so long as the record is sufficient to the task and there is no additional interference with trial court proceedings." *Id.*; see, *e.g.*, *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156,

172 (1974) (court of appeals "had jurisdiction to review fully" the district court's relevant orders).

So too in pendent appellate jurisdiction cases, where "there may be good reasons to undertake review of some matter that would not be independently appealable." 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3937 (3d ed. 2012). That is so especially where there is "a strong relationship between the appealable order and the additional matters swept up into the appeal." *Id.*; see *Swint*, 514 U.S. at 50–51 (declining to resolve the proper scope of pendent appellate jurisdiction, but suggesting that it applies to matters "inextricably intertwined with" or "essential to" the appealable order).

In sum, a district court decision often is appealable for a particular reason, but the scope of the appeal extends beyond that question. Together, these doctrines show that the position urged by Petitioners here—and adopted by other circuits, *e.g.*, *Lu Junhong*, 792 F.3d at 811—is in no way anomalous. Rather, it accords with basic appellate-review principles and permits the court of appeals to rest its decision on the firmest available ground.

III. COMPLETE REVIEW OF REMAND ORDERS IS IMPORTANT TO THE NATION'S BUSINESS COMMUNITY.

The question presented is important to the nation's business community. As the petition notes, this issue has arisen in various contexts involving many industries and sectors of the economy. Pet. 21. Businesses are often the defendants in these cases. *E.g.*, Pet. App. 2a (oil and gas companies); *Lu Junhong*, 792 F.3d at 807 (airplane manufacturer); *Decatur Hosp. Auth.* v. *Aetna Health, Inc.*, 854 F.3d 292, 294 (5th Cir. 2017)

(insurance plan administrator); *Jacks* v. *Meridian Res. Co.*, 701 F.3d 1224, 1227 (8th Cir. 2012) (same). That makes sense: Many businesses work closely with the federal government, whether as federal contractors or otherwise. These partnerships can be essential to the government carrying out its responsibilities because there are many goods and services the government cannot efficiently (or should not) provide on its own. See, *e.g.*, 50 U.S.C. § 4502(a) (congressional finding in the Defense Production Act that "the security of the United States is dependent on the ability of the domestic industrial base to supply materials and services"). These defendants often have grounds for federal-officer removal, and the claims against them frequently implicate other grounds for federal jurisdiction too.

Businesses are also the most frequent defendants in class or mass actions removable under CAFA, which Congress adopted to "ensur[e] 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co.* v. *Knowles*, 568 U.S. 588, 595 (2013). And as explained above, CAFA's appellate provision uses language much like § 1447(d)'s, and thus potentially presents the same scope-of-appeal issue (although the courts of appeals that have addressed the issue in that context have correctly rejected the Fourth Circuit's approach). See *supra* § II.

In each of these contexts, the defendants have "a right and privilege secured . . . by the Constitution and laws of the United States" to "remove the case." *S. Pac. Co.* v. *Denton*, 146 U.S. 202, 207 (1892); see *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 140 (2005) ("By enacting the removal statute, Congress granted a right to a federal forum to a limited class of state-court defendants."). And that right has compelling justifica-

tions—even when the federal-officer or civil-rights removal ground is ultimately unavailing. This Court has observed that diversity jurisdiction protects "those who might otherwise suffer from local prejudice against out-of-state parties," *Hertz Corp.* v. *Friend*, 559 U.S. 77, 85 (2010), and the "federal question removal provision . . . protect[s] federal rights" and "provide[s] a forum that could more accurately interpret federal law," *Boys Mkts, Inc.* v. *Retail Clerks Union Local 770*, 398 U.S. 235, 246 n.13 (1970); see also *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) (upholding removal of claims that "justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues"). Indeed, courts have noted the overlapping rationales for federal-officer removal and "both diversity and federal question jurisdiction": "As with diversity jurisdiction, there is a historic concern about state court bias. As with federal question jurisdiction, there is a desire to have the federal courts decide the federal issues that often arise in cases involving federal officers." *Savoie* v. *Huntington Ingalls, Inc.*, 817 F.3d 457, 460–61 (5th Cir. 2016) (citations omitted), *overruled on other grounds by Latiolais* v. *Huntington Ingalls, Inc.*, 951 F.3d 286 (5th Cir. 2020) (en banc).

Complete review ensures that cases implicating these other jurisdictional grounds are litigated in federal court. It therefore safeguards the removal rights that Congress conferred on certain defendants, including the nation's businesses. In so doing, complete review protects these defendants against any potential bias for in-state parties or against federal laws or defenses. It also ensures that federal courts can decide important federal issues. And as explained above, it does all of this without sacrificing any countervailing policy. *Supra* § I. The Chamber's members—and all

defendants—deserve to have their day in the right court, and at least in cases removed under §§ 1442 and 1443, Congress has empowered the courts of appeals to ensure that they do.

CONCLUSION

For the reasons stated above and in the petition, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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