No. 19-1189

In the Supreme Court of the United States

BP P.L.C., *et al.*, PETITIONERS

v.

MAYOR AND CITY COUNCIL OF BALTIMORE

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

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

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INTEREST 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.

[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.

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 curiae briefs in cases that raise issues of concern to the nation's business community. The Chamber filed amicus briefs at the certiorari stage of this case, as well as in several other cases raising the same issue of appellate procedure. See, *e.g.*, *Bd. of Cnty. Comm'rs of Boulder Cnty.* v. *Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792 (10th Cir. 2020); *Cnty. of San Mateo* v. *Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020); *North Dakota* v. *Heydinger*, 825 F. 3d 912 (8th Cir. 2016).

This case presents a question of appellate procedure that is important to the Nation's business community far beyond the specifics of this case. The question is whether, when a federal appellate court reviews an order remanding to state court a case that was removed on federal-officer or civil-rights grounds, the appellate court's review is limited to that ground or extends to any other ground the district court rejected in issuing the remand order. Private businesses often serve as federal contractors or otherwise work closely with federal agencies and officials, particularly in areas impacting significant national interests and in times of emergency. Indeed, private businesses often partner with the federal government to provide goods and services the government cannot efficiently provide on its own. If companies are later sued in state court for such activities, they will often remove the litigation to federal court before asserting a variety of federal law defenses, including preemption or the government-contractor defense, see *Boyle* v. *United Techs. Corp.*, 487 U.S. 500 (1988). The guarantee

of federal jurisdiction further provides certainties regarding the rules, applicable law, and costs that help incentivize the private sector to assist the government. Businesses are also the usual targets of class actions that involve similar removal and scope-of-appeal issues. Businesses therefore have a strong interest in ensuring that cases that are properly removed to federal court stay there.

The Chamber also has a strong interest in the proper resolution of this underlying public nuisance suit and similar suits being brought by other municipalities. The Chamber believes that the global climate is changing, that human activities contribute to those changes, and that climate change poses a serious long-term challenge that deserves serious solutions. Inaction is simply not an option. The Chamber also believes that businesses, through technology, innovation, and ingenuity, will offer the best options for reducing greenhouse gas emissions and mitigating the impacts of climate change. Specifically, a technology-neutral climate change policy offers the best opportunity to deliver cost-effective, achievable, and meaningful greenhouse gas emissions reductions. Thus, businesses must be part of any productive conversation on addressing climate change.

But greenhouse gasses and their effects do not stop at any one State's borders. The problem is inherently global. Accordingly, the Chamber believes that, under our system of government, thoughtful governmental policies that will have a meaningful impact on global climate change should come from the national government, and in particular from Congress and the Executive Branch. But ad hoc and unpredictable decisions of individual state courts, seeking to govern the worldwide

conduct of a handful of individual defendants, are not a sensible way to address this problem.

SUMMARY OF ARGUMENT

1. When a defendant removes a case to federal court on federal-officer grounds as well as additional grounds, but the district court remands the case to state court, the defendant is entitled to appellate review of whether the case should actually stay in federal court, not merely whether federal-officer removal is available. In 28 U.S.C. 1447(d), Congress authorized appellate review of an "order" remanding a case to state court that was removed on federal-officer or civil-rights grounds. Here, the relevant "order" is the order commanding that the case be returned to state court. By providing for review of the "order," Congress plainly empowered the appellate court to review the propriety of the order itself—*i.e.*, whether the case should be returned to state court—and not merely to review whether the district court was mistaken about one of its reasons for remanding. Full review also permits appellate courts to perform their most basic function: To correct errors in trial court judgments and orders. And in particular, it allows appellate courts to correct an order that is already on appeal and that has wrongly closed the federal courthouse doors to a litigant who has a right to be there.

Correcting those important errors comes at little or no practical cost. Congress generally prohibited appeal of remand orders to avoid the interruption of an immediate appeal, instead allowing the case simply to continue moving forward in the state court. Here, however, Congress has already expressly authorized an appeal of the remand order, so the scope-of-review question arises

only when interruption of the appeal has already occurred and any interruption is fully authorized. And reviewing the entire order provides significant benefits: Ensuring that judicial orders are correct and that a case belonging in federal court stays there.

Complete review also accords with federal appellate procedure in similar contexts. Notably, this Court has already held that the same rule of full review applies to certified interlocutory appeals under 28 U.S.C. 1292(b): "[A]ppellate jurisdiction applies to the *order* certified to the court of appeals," and is not limited "to the particular question formulated by the district court." *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 205 (1996). So too here: Appellate jurisdiction applies to the remand "order," and is not limited to the federal-officer question that prompted the appeal in the first place.

Complete review is important to the business community. Government contractors and other businesses are often defendants in cases subject to removal on federal-officer grounds. As this case illustrates, complex business litigation often involves multiple grounds for removal, including federal-question or diversity removal. These interlocking pieces of federal jurisdiction protect defendants from anti-federal bias and ensure a federal forum for important national issues that must be decided with a national (not local) perspective. Accordingly, when a business removes a case to federal court on federal-officer and federal grounds, but the district court remands the case to state court, the business will often have a strong interest in appealing to vindicate its fundamental interest in having the case heard in federal court.

2. If this Court addresses the separate question of whether federal-question jurisdiction is available here,

the Chamber would urge the Court to hold that the answer is yes. Climate change is one of the biggest challenges facing society today. But it is an inherently national (and indeed international) problem. In particular, only federal law could supply a cause of action for the local manifestations of global climate change caused by a defendant's worldwide contribution to global emissions. Otherwise, virtually any entity in the world could be subject to a welter of overlapping and potentially conflicting regulation by each of the 50 States. The tort claims here thus necessarily arise under federal law.

ARGUMENT

I. The Court May Review The Entirety Of A Remand Order In A Case Removed Under Sections 1442 or 1443

A. The Plain Language of Section 1447(d) Authorizes Full Review

Section 1447(d) provides:

> 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.

28 U.S.C. 1447(d). Remand orders[2] are thus ordinarily unreviewable, even on mandamus. But Congress expressly permitted review of "an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title," 28 U.S.C. 1447(d).

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[2] That is, orders remanding a case to state court because of a lack of subject-matter jurisdiction. *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 342-352 (1976), abrogated in part on other grounds by *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706 (1996).

Those sections provide for removal by a federal "officer (or any person acting under that officer)" and in civil rights cases. See 28 U.S.C. 1442 and 1443. An order remanding a case that was removed pursuant to those provisions "shall be reviewable by appeal or otherwise." 28 U.S.C. 1447(d).

This case involves appellate review of such an order. It is undisputed that this case was "removed pursuant to section 1442." *Ibid.* Respondent sued petitioners in Maryland state court. Pet. App. 2a. Petitioners timely removed the case to federal court, invoking grounds for removal including federal-officer removal. See *id.* at 4a-5a. The district court then issued an "order remanding [the] case to the State court from which it was removed." 28 U.S.C. 1447(d). Specifically, the court issued an "order" stating "that it lacks subject matter jurisdiction over this case" and it thereby "ORDERED" that "[t]his case is REMANDED" to Maryland state court. D. Ct. Doc. 173, at 1 (June 10, 2019). Accordingly, that order "shall be reviewable by appeal or otherwise." 28 U.S.C. 1447(d). The only question is whether the propriety of the "order" itself is reviewable "by appeal or otherwise," or whether there is some unstated limitation that allows appellate review of only one reason for the remand order, namely, the district court's determination that federal-officer or civil-rights removal is unavailable.

The statutory text answers that question by its terms: What is "reviewable by appeal or otherwise" is the "*order* remanding [the] case to the State court from which it was removed pursuant to section 1442 or 1443 of this title." *Ibid.* (emphasis added). An "order" is a "command, direction, or instruction," and in particular a "written direction or command" by a "court or judge" or other government official. *Black's Law Dictionary*

1322 (11th ed. 2019); see also *Webster's Third New International Dictionary* 1588 (1986) ("a command or direction of a court"); *Webster's New International Dictionary* 1716 (2d. ed. 1950) (similar); *Oxford English Dictionary* (3d ed. 2004) ("An authoritative direction; an injunction, or mandate; an oral or written command; an instruction.").

The "order" being reviewed here is the district court's command that the case be returned to the state court from which it came. Accordingly, appellate review is available to determine whether that order is correct, *i.e.*, whether the case should return to state court or stay in federal court. That inquiry naturally encompasses each basis for removal that the district court rejected before commanding that the case be returned to state court. If the district court erred in rejecting any of those grounds for removal, then removal was proper, the district court has subject-matter jurisdiction, and the order is erroneous. As the Seventh Circuit put it, "[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 clause "from which it was removed pursuant to section 1442 or 1443," does not narrow the scope of appellate review. That clause identifies *which orders* are reviewable: Any "order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443," *i.e.*, any remand order following such a removal. 28 U.S.C. 1447(d). But as a matter of grammar, there is no sound basis to read that clause as also simultaneously serving a second but different function of narrowing the scope of appellate review once such an order has been appealed. Cf. *Nielsen* v. *Preap*, 139 S. Ct.

954, 965 (2019). Rather, Congress elsewhere identified the scope of review: A covered "order … shall be reviewable by appeal or otherwise." 28 U.S.C. 1447(d). In other words, Congress permitted review of whether the case must be sent back to state court, not merely whether the district court was mistaken about one reason for not keeping it in federal court.

B. Complete Review Corrects Important Errors Without Delay Or Encouraging Baseless Removal

1. Although the plain meaning of the term "order" is sufficient to decide this case, authorizing review of the entirety of a remand order accords with an appellate court's most basic function of correcting "judgments of [trial] courts which the appellate court concludes were wrong." *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973). Absent complete review, appellate courts would be unable to correct a district court's erroneous order that was already on appeal. In many cases, due to the heavily intertwined grounds for removal, the reviewing court also would be able to readily identify the legal error, but their hands would be tied and they would be forced to affirm the remand order notwithstanding that it is clearly incorrect. Permitting review only of the grounds specified in sections 1442 and 1443, particularly where it may be clear that the district court wrongly decided another ground for removal, thus subverts an appellate court's basic responsibility of correcting legal errors that affect a litigant's substantial rights. Indeed, it puts appellate courts in the awkward position of affirming—and thereby giving their imprimatur to—an order that is erroneous as a matter of law.

There is no sound basis to interpret Section 1447(d) to require an appellate court to ignore a dispositive legal

error in a remand order that is already on appeal. Congress generally prohibited review of remand orders "to spare the parties interruption of the litigation and undue delay in reaching the merits of the dispute," which the remand order sends back to state court. 14C Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 3740 (4th ed. 2018); see *Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 640 (2006) (recognizing that the appellate-review bar reflects a policy against piecemeal litigation through "prolonged litigation of questions of jurisdiction" (quoting *United States* v. *Rice*, 327 U.S. 742, 751 (1946))). "Since the suit must be litigated somewhere, it is usually best to get on with the main event." *Lu Junhong*, 792 F.3d at 813.

The calculus is fundamentally different, however, once Congress has authorized appeal of the remand order. At that point, Congress has already authorized "a court of appeals … to take the time necessary to determine the right forum," *ibid.*, and "there is very little to be gained by limiting review." 15A Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 3914.11 (2d ed. 1992).

First, once a removal order is already on appeal, the basic interruption of the underlying proceedings has already occurred: Irrespective of how many issues the appellant raises in the briefing, the appeal will proceed. Second, 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. The median time for an appeal to be decided is 9.1 months, Fed. Judicial Ctr, *U.S. Court of Appeals—Judicial Caseload Profile*, https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0630.2020.pdf (June 2020),

and an appeal can often take more than a year. Adding an extra issue or issues on appeal is unlikely to increase that timeframe appreciably—especially when the court is still only reviewing a single order. Among other things, the notice of appeal will be due on the same day, see 28 U.S.C. 2101, and the briefing schedule and date of oral argument (if any) will typically be unaffected. See Fed. R. App. P. 31(a). Either way, the total time involved is thus likely to be of a similar magnitude.

The benefits of complete review—*i.e.*, ensuring that cases that should be decided by a federal court are not wrongfully sent back to state court—thus far outweigh the interest in preventing review to avoid interruption in the underlying proceedings, because Congress has already authorized an appeal. Indeed, complete review even may allow the court to decide a case on a narrower ground and avoid deciding a thornier issue (even potentially allowing for a faster decision). For example, if the appellate court can easily determine that a different ground for removal is available, but the federal-officer question is complex, the court could reverse on the easier ground and thereby avoid "substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case." *Pearson* v. *Callahan*, 555 U.S. 223, 236-237 (2009).

2. Respondents contend (Br. in Opp. 22) that reviewing the remand order (rather than just part of its reasoning) will nonetheless cause delays by "encouraging meritless assertions of civil-rights or federal-officer jurisdiction." But this Court will not "rewrite [a] statute simply to accommodate [a] policy concern." *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 531 (2019). Congress provided that a covered "order … shall be reviewable by appeal or otherwise," 28 U.S.C.

1447(d), so review is plainly available to determine whether the district court correctly ordered the case to be returned to state court.

Moreover, "[s]ufficient sanctions are available to deter frivolous removal arguments that this fear should be put aside against the sorry possibility that experience will give it color." 15A Wright & Miller § 3914.11; see *Lu Junhong*, 792 F.3d at 813 ("a frivolous removal leads to sanctions"). The requirements for removal under Sections 1442 and 1443 are demanding; Section 1447 authorizes the imposition of "just costs and any actual expenses, including attorney fees, incurred as a result of the removal," 28 U.S.C. 1447(c); and a notice of removal must be "signed pursuant to Rule 11 of the Federal Rules of Civil Procedure," 28 U.S.C. 1446(a); see Fed. R. Civ. P. 11(b)-(c) (authorizing sanctions); 28 U.S.C. 1927 (same). Furthermore, a court of appeals could potentially determine that a case was not actually "removed pursuant to sections 1442 or 1443," within the meaning of Section 1447(d), if the claim to federal-officer or civil-rights removal was "wholly insubstantial and frivolous." Cf. *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946). Those tailored protections against frivolous filings are the appropriate way to address respondent's concern, not a blanket prohibition against an appellate court correcting an erroneous order that is already on appeal.

Respondent's concern also overlooks that, even under its own rule, defendants with colorable federal-officer or civil-rights claims already have a powerful incentive to raise those claims (and appeal remand orders): The defendant might prevail on that claim and thus be able to have the entire case heard in federal court. It is thus far from clear that allowing complete review would appreciably increase the number of appeals that defendants

actually file from remand orders that are already appealable. And as here, absent a stay, the litigation will proceed in the state court. See, *e.g.*, Pet. App. 82a-96a (orders denying stay pending appeal). In any event, Congress authorized review of a covered remand "order," without regard to the defendant's subjective motivations for appealing or their view of the comparative strength of the different grounds for removal.

C. Complete Review Accords With Federal Appellate Procedure In Similar Contexts

1. Reviewing the propriety of the remand order, rather than just one part of the district court's reasoning, is consistent with basic principles of appellate review applicable in similar contexts. Federal appellate courts review "judgments, not statements in opinions." *Camreta* v. *Greene*, 563 U.S. 692, 704 (2011) (quoting *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam)); see *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) (describing the power "to correct wrong judgments, not to revise opinions"). In particular, an appellate court's usual task is to review a district court's orders or judgments to determine whether they are correct. By analogy, the ordinary question here is whether the order remanding the case to state court was correct, not whether the district court's reasoning was correct in only one particular respect. After all, what matters in the real world is whether the district court properly returned the case to state court, not whether the court said the right words along the way.

Limited-scope appeals are the exception, not the rule. And even in those cases, the scope of appellate review often extends beyond the specific ground that author-

ized it. Notably, this Court has held that review of a certified interlocutory order extends beyond the question of law that justified the appeal in the first place. See *Yamaha*, 516 U.S. at 205. Under 28 U.S.C. 1292(b), a certified interlocutory appeal is available if the district court certifies that the "order involves a controlling question of law as to which there is substantial ground for difference of opinion." In *Yamaha*, this Court held that, once the district court has certified an order for interlocutory appeal and the court of appeals accepts the certification, appellate review is not limited to the "controlling question" on which the appeal was predicated; it reaches "any issue fairly included within the certified order." 516 U.S. at 205.

The Court's rationale in *Yamaha* applies with full force here. In *Yamaha*, this Court relied solely on the plain meaning of the term "order": "As the text of § 1292(b) indicates, 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." *Ibid.* The Court took that term to mean what it says: "The court of appeals may not reach beyond the certified order to address other orders made in the case," but "may address any issue fairly included within the certified order because 'it is the *order* that is appealable.'" *Ibid.* (citation omitted). Here, Congress similarly provided that an "order" is appealable. 28 U.S.C. 1447(d). Accordingly, although the court of appeals could not review any other orders the district court issued, it "may address any issue fairly included within the [remand] order," *Yamaha*, 516 U.S. at 205. That allows review of any grounds for removal that the district court rejected in commanding that the case be returned to state court.

Likewise, appellate review of interlocutory injunction appeals under 28 U.S.C. 1292(a)(1) "ordinarily focuses on the injunction decision itself, but the scope of appeal is not rigidly limited." 16 Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure* § 3921.1 (3d ed. 2012). "[O]ther matters may be inextricably bound up with the decision or may be considered in the wise administration of appellate resources." *Ibid.*; 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); cf. *Smith* v. *Vulcan Iron Works*, 165 U.S. 518, 524-525 (1897) (holding that the "natural meaning" of Section 1292(a)(1)'s predecessor 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").

Similar principles apply to the review in collateral-order and pendant-appellate-jurisdiction cases. Once the requirements for a collateral appeal are satisfied, see *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978), 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," 15A Wright & Miller § 3911.2; 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). The same rule applies for pendant appellate jurisdiction, where "there may be good reasons to

undertake review of some matter that would not be independently appealable." 16 Wright & Miller § 3937. This is especially true where there is "a strong relationship between the appealable order and the additional matters swept up into the appeal." *Ibid.*; *Mueller* v. *Auker*, 576 F.3d 979, 990 (9th Cir. 2009) (permitting review of otherwise non-appealable issues "inextricably intertwined" with the appealable ones); cf. *Asher* v. *Baxter Int'l Inc.*, 505 F.3d 736, 740 (7th Cir. 2007) (Easterbrook, J.) (suggesting, in dicta, that an appeal under Federal Rule of Civil Procedure 23(f), "presents *the order* for appellate decision, and a court of appeals is free to address all considerations that make the order sound or erroneous").[3]

In sum, appellate review often extends beyond the particular reason for allowing a party to appeal the district court's decision in the first place. Together, these doctrines show that petitioners' position accords with ordinary appellate-review principles and permits appellate courts to perform their most basic function of correcting erroneous orders. The court of appeals' rule, by

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[3] Under the Class Action Fairness Act (CAFA), 28 U.S.C. 1453, a court of appeals has discretion to review "an order of a district court granting or denying a motion to remand a class action." Most courts of appeals to address the question have correctly held that, in such an appeal, the court 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, 673 (9th Cir. 2012) (quoting *Coffey* v. *Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1247 (10th Cir. 2009)); *Brill* v. *Countrywide Home Loans, Inc.*, 427 F.3d 446, 451 (7th Cir. 2005); but see *Walker* v. *La. Dep't of Tranps. & Dev.*, 877 F.3d 563 (5th Cir. 2017). Several other courts of appeals apply the same rule to other statutes that permit review of "orders," authorizing review of the entire order, not just the ground permitting review. See Pet. Br. at 24-25.

contrast, is out of step with the statutory text and sound appellate practice, and is damaging to the administration of justice by forcing appellate courts to affirm erroneous orders that close the federal courthouse doors to defendants that have a right to be there.

2. The court of appeals attempted to distinguish Section 1292(b) appeals as merely governing "*when*" appellate review of a particular question will occur, whereas (in its view) Section 1447(d) governs "*which* issues" will be reviewed. Pet. App. 9a. But under *Yamaha*, that distinction is immaterial. What mattered was that Congress authorized review of an "order." See *Yamaha*, 516 U.S. at 205. Congress did the same thing here. Furthermore, the reason Congress has generally barred review of a remand order is to avoid the interruption an appeal would cause. See p. 10, *supra*. That rationale ceases to apply, however, once Congress has already authorized an immediate appeal. See *ibid.*

In any event, the "when"/"which" distinction does not always hold. For example, a district court could certify for immediate interlocutory review an order denying a motion for summary judgment, see 28 U.S.C. 1292(b), notwithstanding that the same order would be unreviewable after entry of a final judgment, see *Ortiz* v. *Jordan*, 562 U.S. 180 (2011). And that interlocutory appeal would reach "any issue fairly included within the certified order," not just the controlling legal question that prompted the certification, *Yamaha*, 516 U.S. at 205.

Respondents have also argued (Br. in Opp. 21) that "exception clauses … must be narrowly construed." *Ibid.* (citing *United States* v. *Scharton*, 285 U.S. 518, 521-522 (1932)). But in the modern era, this Court reads exception clauses without putting a thumb on the scale: Absent a "textual indication," "there is no reason to give

[statutory exceptions] anything other than a fair (rather than a 'narrow') interpretation." *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1142 (2018) (quoting Antonin Scalia & Bryan Garner, *Reading Law* 363 (2012)). Furthermore, even if this Court were to apply a narrow-construction canon, it is not clear which way it would cut: The unreviewability of remand orders is *itself* an exception to the general rule that judicial orders are ordinarily reviewable. And no established canon of construction indicates that an exception to an exception should be interpreted narrowly (or broadly).

In any event, this Court need not decide whether any such rule of construction would apply, because the statutory text is plain. Cf. *Opati* v. *Republic of Sudan*, 140 S. Ct. 1601, 1608 (2020). There is no plausible textual basis to read Congress's authorization of review of a covered "order" to mean anything other than to permit review of whether that "order" is correct.

D. Complete Review Is Important To The Business Community And Accords With Congressional Policy

The ability to obtain appellate review of whether a case should be returned to state court (and not merely whether the district court was mistaken about one reason for its remand order) is important to the nation's business community because it helps to ensure that cases implicating important federal interests are heard in federal court.

Businesses are often the defendants in federal-officer removal cases. Federal officer removal extends to "any officer (or any person acting under that officer) of the United States or of any agency, in an official or individual capacity, for or relating to any act under color of such

office." 28 U.S.C. 1442(a)(1). A private party acts "under" a federal officer or agency when its conduct is subject to federal "subjection, guidance, or control" and the party is involved in "an effort to assist, or to help carry out, the duties or tasks of the federal superior." *Watson* v. *Philip Morris Cos.*, 551 U.S. 142, 151-152 (2007) (emphasis omitted).

Businesses—and in particular government contractors—are often in this position. The federal government has increasingly turned to businesses through public-private partnerships to achieve its goals. Fed. Acct. Standards Advisory Bd., *Public-Private Partnerships Disclosure Requirements*, http://files.fasab.gov/pdffiles/p3_disclosures_ed_2014.pdf (Oct. 1, 2014). Indeed, the government spends $500 billion on government contracts each year for both goods and services to "execute its mission." USA Spending Data Lab, *Contract Federal Explorer*, https://datalab.usaspending.gov/contract-explorer/ (last visited Nov. 20, 2020). For example, the Congressional Research Service has observed that the Department of Defense would be "unable to arm and field an effective fighting force" without contractor support. Cong. Rsch. Serv., R44010, *Defense Acquisitions: How and Where DOD Spends Its Contracting Dollars* 1 (Apr. 2015). The Department of Veterans Affairs similarly spends $27 billion in government contracts in a "critical partnership with industry for various products and services." U.S. Dep't of Veteran Affairs, *FY 2021/FY 2019 Annual Performance Plan & Report* 76, 114, https://www.va.gov/oei/docs/VA2021appr.pdf (Feb. 2020). And according to published statistics, the government has already committed more than $27 billion in contracts for goods and services in response to the COVID-19 pandemic. Moiz Syed & David Willis,

ProPublica, *Tracking Federal Purchases to Fight the Coronavirus*, https://projects.propublica.org/coronavirus-contracts/ (May 27, 2020, last updated Nov. 20, 2020).

As a result, the federal-officer removal issue arises in a wide range of contexts, including aviation, see *Lu Junhong*, 792 F.3d at 807, health-care insurance plan administration, *Decatur Hosp. Auth.* v. *Aetna Health, Inc.*, 854 F.3d 292, 294 (5th Cir. 2017), and oil and gas production, as here. In these and many other contexts, businesses work closely with the federal government, carrying out partnerships to provide goods and services essential to a government's function. See, *e.g.*, 50 U.S.C. 4502(a)(1) (Defense Production Act congressional finding 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.

Even where the appellate court determines that federal-officer or civil-rights removal is unavailable, the defendants may still have "a right and privilege secured … by the [C]onstitution and laws of the United States" on some other basis to have their case heard in federal court. *S. Pac. Co.* v. *Denton*, 146 U.S. 202, 207 (1892); see *Martin* v. *Franklin Cap. 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."). Without full review, those independent rights to a federal forum would be lost even when the remand order is on appeal and the court of appeals could readily determine that it is erroneous.

Moreover, the justifications for providing a federal forum do not evaporate simply because the federal-officer

or civil-rights removal ground is ultimately unavailing. For example, this Court has recognized 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 federal-question removal "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 overlap between the rationales for federal-officer removal and "both diversity and federal question jurisdiction": "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), overruled on other grounds by *Latiolais* v. *Huntington Ingalls, Inc.*, 951 F.3d 286 (5th Cir. 2020) (en banc). Even if federal-officer or civil-rights removal is unavailable in a given case, those underlying federal interests may remain present in full force.

Furthermore, it is particularly important that a federal forum is available for cases brought by state entities implicating federal laws, federal defenses, or uniquely federal concerns. In such cases, the potential bias for in-state parties is significant. Complete review of remand orders allows appellate courts to vindicate those interests at little or no cost.

This case is a good example. Petitioners identified several grounds for removal, most of which fall outside

Section 1442, but implicate similar federal interests. Those interests remain present, but the Fourth Circuit effectively ignored them by looking at only part of the picture. Furthermore, the other grounds for removal were fully briefed and argued, so adjudicating them would have caused, at most, only marginal additional delay. Compete review, by contrast, would avoid that myopic approach to appellate review and prevent cases from being wrongfully returned to state court. The Chambers' members—like all defendants—are entitled to the safeguards of a federal court when Congress has provided it. And when Congress has already authorized an appeal, it is imperative that federal appellate courts protect those rights as well.

II. If This Court Addresses The Validity Of The Remand Order, The Court Should Hold That This Case Belongs In Federal Court

In addition to arguing that the court of appeals erred in deciding the scope-of-review question on which this Court granted certiorari, petitioners contend (Br. 37) this Court should also review the question of whether the remand order is erroneous because respondent's lawsuit raises a federal question under 28 U.S.C. 1331. See 28 U.S.C. 1441(a). If the Court addresses that question, this Court should hold that federal-question removal was proper. The federal questions at the heart of this dispute also help illustrate the importance of reviewing an entire remand order when that order is already in front of an appellate court.

As Judge Alsup thoughtfully explained in finding federal-question jurisdiction in a materially identical case brought by the Cities of San Francisco and Oakland, these kinds of public nuisance claims—which seek

to impose liability based solely on the local effects of "the national and international geophysical phenomenon of global warming"—"are necessarily governed by federal common law." *California* v. *BP P.L.C.*, 2018 WL 1064293, at *2 (N.D. Cal. Feb. 27, 2018) (*California*), vacated and remanded sub nom. *City of Oakland* v. *BP PLC*, 969 F.3d 895 (9th Cir. 2020).

Although there is no general federal common law, "[e]nvironmental protection is undoubtedly an area 'within national legislative power,' one in which federal courts may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'" *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 421 (2011) (*AEP*) (quoting Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 421-422 (1964)). "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Ibid.* (quoting *Illinois* v. *Milwaukee*, 406 U.S. 91, 103 (1972) (*Milwaukee I*)).

In *Milwaukee I*, this Court applied federal common law to a nuisance claim challenging the local effects of pollution from out-of-state sources, explaining that:

> Federal common law and not the varying common law of the individual States is … entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain. The more would this seem to be imperative in the present era of growing concern on the part of a State about its ecological conditions and impairments of them. In the outside sources of such impairment, more conflicting disputes, increasing assertions and proliferating contentions would seem to be inevitable. Until the field has been made the subject

> of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights.

406 U.S. at 107 n.9 (citation omitted). In *AEP*, this Court further held that because the Clean Air Act, 42 U.S.C. 7401 *et seq.*, regulates carbon dioxide emissions from stationary sources, Congress had foreclosed any federal common-law right to seek abatement of such emissions because of their contribution to global warming. *AEP*, 564 U.S. at 424-425. But Congress's choice to adopt that federal regulatory scheme does nothing to diminish the need for a uniform federal rule in this context.

Indeed, global warming "crie[s] out" for a "uniform and comprehensive" response. *California,* 2018 WL 1064293, *3. Everybody in this case accepts the science of global warming and recognizes its dangers. But global warming is, by definition, a global phenomenon. Activity by countless people worldwide causes emissions, which "disperse throughout the atmosphere and remain there for anywhere from 50 to 200 years," *Massachusetts* v. *E.P.A.*, 549 U.S. 497, 543 (2007) (Roberts, C.J., dissenting), with effects (including sea level rise) that are also felt worldwide. Respondent's claims focusing solely on the local manifestations of that worldwide phenomenon thus unavoidably implicate the interests of all 50 States, as well as the United States' relationships with all other nations. Any liability rule for such a claim in turn must be governed by national law, not municipal law. After all, a single state cannot "impos[e] its regulatory policies on the entire Nation," *BMW of N. Am., Inc.*

v. *Gore*, 517 U.S. 559, 571, 585 (1996), much less the entire planet.

Respondents also cannot avoid federal jurisdiction over such an inherently national claim simply by asserting that their claims arise under state law, when only federal law could supply a rule of decision. "Allied as an 'independent corollary' to the well-pleaded complaint rule" is the so-called "artful pleading" doctrine, under which "'a plaintiff may not defeat removal by omitting to plead necessary federal questions.'" *Rivet* v. *Regions Bank of La.*, 522 U.S. 470, 475 (1998) (Ginsburg, J.) (citation omitted). "[A] plaintiff [thus] cannot frustrate a defendant's right to remove by pleading a case without reference to any federal law when the plaintiff's claim is necessarily federal." 14C Wright & Miller § 3722.1. And although "artful pleading" typically involves efforts to evade complete preemption by a federal statute, "[n]o plausible reason" exists why "the appropriateness of and need for a federal forum should turn on whether the claim arose under a federal statute or under federal common law." Richard H. Fallon Jr., et al., *Hart & Wechsler's Federal Courts and the Federal System* 818 (7th ed. 2015).

The nation's business community has a strong interest in not being subject to a patchwork of overlapping and potentially inconsistent laws from each of the 50 States. The prospect of individual state courts fashioning a novel public nuisance tort to set national (and indeed international) regulatory policy could make it 'virtually impossible" for businesses "to predict the standard" governing their conduct nationwide. *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 497 (1987) (citation omitted). Rather, the Chamber supports uniform action from the national government to address global climate change,

including via participation in the Paris Agreement. In particular, the Chamber supports action from Congress and the Executive Branch that can harness the creative power of industry to combat this serious problem.

In any event, regardless of whether respondent's claims ultimately arise under federal law, the court of appeals erred in concluding that it lacked jurisdiction even to decide that important question.

CONCLUSION

For the foregoing reasons, the Court should vacate the court of appeals' judgment and remand for further proceedings.

Respectfully submitted.

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