No.

# In the Supreme Court of the United States

BP P.L.C., ET AL., PETITIONERS

*v.*

MAYOR AND CITY COUNCIL OF BALTIMORE

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

## PETITION FOR A WRIT OF CERTIORARI


THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER LLP
*333 South Grand Street*
*Los Angeles, CA 90071*

JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
*1050 Connecticut Avenue, N.W.*
*Washington, DC 20036*

ANNE CHAMPION
GIBSON, DUNN & CRUTCHER LLP
*200 Park Avenue*
*New York, NY 10166*

DAVID C. FREDERICK
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
*1615 M Street, N.W., Suite 400*
*Washington, DC 20036*

KANNON K. SHANMUGAM
*Counsel of Record*
WILLIAM T. MARKS
TANYA S. MANNO
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
*2001 K Street, N.W.*
*Washington, DC 20006*
*(202) 223-7300*
*kshanmugam@paulweiss.com*

THEODORE V. WELLS, JR.
DANIEL J. TOAL
AGBEKO C. PETTY
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
*1285 Avenue of the Americas*
*New York, NY 10019*

(*additional counsel on signature page*)

## QUESTION PRESENTED

Section 1447(d) of Title 28 of the United States Code generally precludes appellate review of an order remanding a removed case to state court. But Section 1447(d) expressly provides that an "order remanding a case * * * removed pursuant to" the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443, "shall be reviewable by appeal or otherwise." Some courts of appeals have interpreted Section 1447(d) to permit appellate review of any issue encompassed in a district court's remand order where the removing defendant premised removal in part on the federal-officer or civil-rights removal statutes; other courts of appeals, including the Fourth Circuit in this case, have held that appellate review is limited to the federal-officer or civil-rights ground for removal. The question presented is as follows:

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

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are BP p.l.c.; BP America Inc.; BP Products North America Inc.; Chevron Corporation; Chevron U.S.A., Inc.; CITGO Petroleum Corporation; CNX Resources Corporation; ConocoPhillips; ConocoPhillips Company; CONSOL Energy Inc.; CONSOL Marine Terminals LLC; Crown Central LLC; Crown Central New Holdings LLC; Exxon Mobil Corporation; ExxonMobil Oil Corporation; Hess Corporation; Marathon Petroleum Corporation; Phillips 66; Royal Dutch Shell plc; Shell Oil Company; and Speedway LLC.

Petitioner BP p.l.c. has no parent corporation, and no publicly held company holds 10% or more of its stock.

Petitioners BP America Inc. and BP Products North America Inc. are wholly owned indirect subsidiaries of petitioner BP p.l.c.

Petitioner Chevron Corporation has no parent corporation, and no publicly held company holds 10% or more of its stock.

Petitioner Chevron U.S.A., Inc., is a wholly owned subsidiary of petitioner Chevron Corporation.

Petitioner CITGO Petroleum Corporation is a wholly owned indirect subsidiary of Petróleos de Venezuela S.A. No publicly held company holds 10% or more of Petróleos de Venezuela S.A.'s stock.

Petitioner CNX Resources Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner ConocoPhillips has no parent corporation, and no publicly held company holds 10% or more of its stock.

Petitioner ConocoPhillips Company is a wholly owned subsidiary of petitioner ConocoPhillips.

Petitioner CONSOL Energy Inc., has no parent corporation. BlackRock, Inc., through itself or its subsidiaries, owns 10% or more of CONSOL Energy Inc.'s stock.

Petitioner CONSOL Marine Terminals LLC is a wholly owned indirect subsidiary of petitioner CONSOL Energy Inc.

Petitioner Crown Central New Holdings LLC is the sole member of petitioner Crown Central LLC. The sole member of Crown Central New Holdings LLC is Rosemore Holdings, Inc., a wholly owned subsidiary of Rosemore, Inc. No publicly held company owns 10% or more of Rosemore, Inc.'s stock.

Petitioner Exxon Mobil Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner ExxonMobil Oil Corporation is a wholly owned indirect subsidiary of petitioner Exxon Mobil Corporation.

Petitioner Hess Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Marathon Petroleum Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Speedway LLC is a wholly owned indirect subsidiary of Marathon Petroleum Corporation.

Petitioner Phillips 66 has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Royal Dutch Shell plc has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Shell Oil Company is a wholly owned indirect subsidiary of petitioner Royal Dutch Shell plc.

Respondent is the Mayor and City Council of Baltimore.

**RELATED PROCEEDINGS**

United States District Court (D. Md.):

*Mayor and City Council of Baltimore* v. *BP p.l.c.*, Civ. No. 18-2357 (June 10, 2019)

*Mayor and City Council of Baltimore* v. *BP p.l.c.*, Civ. No. 18-2357 (July 31, 2019) (order on motion for a stay pending appeal)

United States Court of Appeals (4th Cir.):

*Mayor and City Council of Baltimore* v. *BP p.l.c.*, No. 19-1644 (Oct. 1, 2019) (order on motion for a stay pending appeal)

*Mayor and City Council of Baltimore* v. *BP p.l.c.*, No. 19-1644 (Mar. 6, 2020)

United States Supreme Court:

*BP p.l.c.* v. *Mayor and City Council of Baltimore*, No. 19A368 (Oct. 22, 2019) (order on motion for a stay pending appeal)

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BP p.l.c.; BP America Inc.; BP Products North America Inc.; Chevron Corporation; Chevron U.S.A., Inc.; CITGO Petroleum Corporation; CNX Resources Corporation; ConocoPhillips; ConocoPhillips Company; CONSOL Energy Inc.; CONSOL Marine Terminals LLC; Crown Central LLC; Crown Central New Holdings LLC; Exxon Mobil Corporation; ExxonMobil Oil Corporation; Hess Corporation; Marathon Petroleum Corporation; Phillips 66; Royal Dutch Shell plc; Shell Oil Company; and Speedway LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is not yet reported. The opinion of the district court (App., *infra*, 31a-81a) is reported at 388 F. Supp. 3d 538.

## JURISDICTION

The judgment of the court of appeals was entered on March 6, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

Section 1447(d) of Title 28 of the United States Code 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.

## STATEMENT

This case presents a recurring and indisputably important question of appellate jurisdiction that has divided the federal courts of appeals. While a court of appeals ordinarily lacks jurisdiction to review a district court's order remanding a removed case to state court, 28 U.S.C. 1447(d) expressly authorizes appellate review of "an order remanding a case * * * removed pursuant to" the federal-officer or civil-rights removal statutes.

In an opinion by Judge Easterbrook, the Seventh Circuit held that Section 1447(d) permits appellate review of any issue encompassed in a district court's remand order where the removing defendant premised removal in part on the federal-officer or civil-rights removal statutes. That court found dispositive the statutory text and

purpose, as well as this Court's interpretation of an analogous jurisdictional statute. Two other courts of appeals have recently endorsed the Seventh Circuit's approach. Six other courts of appeals, however, have held that Section 1447(d) permits review of only the federal-officer or civil-rights grounds for removal in cases removed under those statutes. The question presented is whether Section 1447(d) permits a court of appeals to review any issue encompassed in a remand order where the removing defendant premised removal in part on the federal-officer or civil-rights removal statutes.

Petitioners in this case are 21 domestic and foreign energy companies that extract, produce, distribute, or sell fossil fuels around the world; respondent is the municipal government of Baltimore, Maryland. Like a number of other state and local governments, respondent filed this action against petitioners in Maryland state court, seeking to recover damages under state law for harms that it claims it has sustained and will sustain due to global climate change.

As in other similar cases, petitioners removed this case to federal court, asserting multiple grounds for removal. Among those grounds, petitioners contended that removal was appropriate under the federal-officer removal statute, 28 U.S.C. 1442, because respondent's complaint encompassed petitioners' exploration for and production of fossil fuels at the direction of federal officers. The district court remanded the case to state court, and petitioners appealed.

The court of appeals affirmed. It held that 28 U.S.C. 1447(d), as construed in an earlier opinion from that court, deprived it of jurisdiction to consider any of the grounds for removal that the district court had addressed and that the parties had briefed and argued on appeal, except for

the federal-officer ground. In so holding, the court of appeals expressly acknowledged the presence of a circuit conflict on the question whether Section 1447(d) permits a court of appeals to review any issue encompassed in a district court's remand order where the removing defendant premised removal in part on the federal-officer or civil-rights removal statutes.

This case is an ideal vehicle for resolving an entrenched conflict on an important and frequently recurring question of federal law. In fact, the question is currently pending in several other nearly identical climate-change lawsuits in courts across the Nation. The petition for a writ of certiorari should be granted.

**A. Background**

In the Judiciary Act of 1789, Congress first permitted defendants to remove to federal court certain actions initially brought in state court. See ch. 20, § 12, 1 Stat. 79-80. Since then, Congress has enacted a number of removal provisions, see, *e.g.*, 28 U.S.C. 1441-1444, and has set forth detailed procedures for removing cases, see, *e.g.*, 28 U.S.C. 1446-1450, 1455.

As a general rule, once a case is removed to a federal district court, the court must determine whether it has subject-matter jurisdiction over the action. See 28 U.S.C. 1447(c). If it determines at any time that it lacks subject-matter jurisdiction, it must remand the case to state court. See *ibid.* The district court must also remand the case if, after removal, a party files a timely motion identifying a procedural defect in the removal. See *ibid.*

Federal courts of appeals have limited jurisdiction to review an order remanding a removed action to state court. The general rule, set forth in the first clause of 28 U.S.C. 1447(d), is that "an order remanding a case to [state court] is not reviewable on appeal or otherwise."

But the second clause of Section 1447(d) expressly provides that any "order remanding a case to the [s]tate court from which it was removed pursuant to" the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443, is "reviewable by appeal or otherwise."

The provisions expressly permitting appellate review of remand orders arose from separate legislation. Congress enacted the provision permitting appeals of cases removed under the civil-rights removal statute as part of the Civil Rights Act of 1964. See Pub. L. No. 88-352, § 901, 78 Stat. 266. Congress enacted the provision permitting appeals of cases removed under the federal-officer removal statute as part of the Removal Clarification Act of 2011. See Pub. L. No. 112-51, § 2(d), 125 Stat. 546.

Those provisions, now codified together in 28 U.S.C. 1447(d), permit review "by appeal or otherwise" of the district court's "order remanding [the] case" to state court. Because a remand order is an appealable final decision under 28 U.S.C. 1291, see *Quackenbush* v. *Allstate Insurance Co.*, 517 U.S. 706, 714-715 (1996), federal courts of appeals have appellate jurisdiction over an order remanding a case removed under Section 1442 or 1443.

**B. Facts And Procedural History**

1. In 2017, a number of state and local governments began filing lawsuits in state courts against various energy companies, most of them nonresidents of the forum States, alleging that the companies' worldwide extraction, production, sale, and promotion of fossil fuels had caused injury by contributing to global climate change. Those lawsuits primarily assert that the extraction, production, sale, and promotion of fossil fuels constitute a public nui-

sance and give rise to product liability under state common law; the plaintiffs are seeking relief largely in the form of compensatory and punitive damages.

The defendants removed nearly all of those lawsuits to federal court. The defendants asserted multiple bases for federal jurisdiction, including that the allegations in the complaints pertain to actions petitioners took at the direction of federal officers, see 28 U.S.C. 1442; that respondent's climate-change claims necessarily arise under federal common law, cf. *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410, 420-423 (2011); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 103 (1972); and that federal-question jurisdiction was otherwise present under *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), and under the doctrine of complete preemption. One district court has thus far permitted removal; others have remanded the cases to state court for lack of subject-matter jurisdiction. Each of those cases is currently pending on appeal. See App., *infra*, 1a-30a; *Rhode Island* v. *Shell Oil Products Co.*, No. 19-1818 (1st Cir.); *County of San Mateo* v. *Chevron Corp.*, No. 18-15499 (9th Cir.); *City of Oakland* v. *BP p.l.c.*, No. 18-16663 (9th Cir.); *Board of County Commissioners of Boulder County* v. *Suncor Energy (U.S.A.) Inc.*, No. 19-1330 (10th Cir.).

2. Petitioners are 21 domestic and foreign energy companies that extract, produce, distribute, or sell fossil fuels around the world. In 2018, respondent filed suit in Maryland state court against petitioners and five other defendants. The complaint alleges that petitioners have contributed to global climate change, which in turn has caused or will cause harm in Baltimore. The complaint pleads a variety of causes of action that respondent asserts arise under state law. Respondent seeks, among

other things, compensatory and punitive damages. App., *infra*, 2a-4a, 5a n.3.[1]

Petitioners removed this action to the United States District Court for the District of Maryland. App., *infra*, 4a. In their notice of removal, petitioners asserted many of the same bases for federal jurisdiction as have the defendants in other municipal climate-change lawsuits, see p. 6, *supra*, including that removal is permissible under the federal-officer removal statute and that respondent's claims necessarily arise under federal common law. App., *infra*, 4a-5a.

Respondent moved to remand the case to state court based on a lack of subject-matter jurisdiction, and the district court granted the motion. App., *infra*, 31a-81a. The district court acknowledged that other courts faced with similar climate-change-related claims had "reached opposing conclusions as to removal," *id.* at 46a, but it ultimately rejected each of petitioners' bases for federal-court jurisdiction, *id.* at 81a.

The district court initially stayed execution of the remand order, but then denied petitioners' motion for a stay pending appeal. App., *infra*, 82a-94a. As is relevant here, the court agreed with petitioners that whether respondent's claims arose under federal common law "present[ed] a complex and unsettled legal question." *Id.* at 87a. But the court concluded that, under 28 U.S.C. 1447(d), the scope of review on appeal would be limited to the question whether removal was proper under the federal-officer removal statute. App., *infra*, 87a-90a. In the district court's view, petitioners were unlikely to prevail on that ground

[1] Several petitioners contend that they are not subject to personal jurisdiction in the Maryland courts, and they have separately moved to dismiss the complaint on that ground. They are litigating the removal issue subject to that objection.

for removal, and the other equitable factors did not justify a stay. *Id.* at 90a-94a.[2]

3. The court of appeals affirmed the district court's remand order. App., *infra*, 1a-30a. The court of appeals began its analysis with the "threshold question" of the scope of its appellate jurisdiction under Section 1447(d). *Id.* at 6a. The court observed that, in *Noel* v. *McCain*, 538 F.2d 633 (4th Cir. 1976), it had held that Section 1447(d) deprived appellate courts of "jurisdiction to review any ground" for removal addressed in a remand order "other than the one specifically exempted from [Section] 1447(d)'s bar on review" (which at the time was only civil-rights removal, see p. 5, *supra*). App., *infra*, 7a.

While petitioners argued that subsequent changes in the law had abrogated the Fourth Circuit's decision in *Noel*, the court of appeals disagreed. App., *infra*, 7a-10a. Petitioners first relied on this Court's decision in *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199 (1996). There, the Court addressed the question whether, in an interlocutory appeal under 28 U.S.C. 1292(b), a court of appeals could review any issue fairly encompassed in a district court's certified order. Section 1292(b) permits a court of appeals to entertain an interlocutory appeal "from [an] order" when the district court certifies that "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." In *Yamaha*, this Court held that appellate review of any issue encompassed in the certified order was permissible

[2] The court of appeals denied petitioners' motion for a stay pending appeal, App. *infra*, 95a-96a, as did this Court, see No. 19A368 (Oct. 22, 2019).

because "it is the *order* that is appealable, and not the particular question formulated by the district court." 516 U.S. at 205 (citation omitted). Acknowledging that the Seventh Circuit had relied on *Yamaha* in reaching a different conclusion, the court of appeals held that it was nevertheless bound by *Noel* because *Yamaha* involved Section 1292(b) and not Section 1447(d). App., *infra*, 8a-9a.

Petitioners also contended that Congress had incorporated the decision in *Yamaha* into Section 1447(d) by amending that provision in 2011 while retaining the reference to remand "order[s]." App, *infra*, 9a-10a; see p. 5, *supra*. But the court of appeals rejected that contention for the same reason, noting that "*Yamaha* did not interpret the scope of [Section] 1447(d), let alone involve a remand order." App., *infra*, 9a. Accordingly, the court of appeals "dismiss[ed] th[e] appeal for lack of jurisdiction insofar as it seeks to challenge the district court's determination" on any ground other than federal-officer removal. *Id.* at 10a (internal quotation marks and citation omitted).

The court of appeals then held that the federal-officer removal statute did not permit removal of this case. App., *infra*, 10a-30a. The court reasoned that, to the extent that petitioners relied on their contractual relationships with the federal government, either petitioners were not acting under a federal officer in carrying out those relationships, or there was an insufficient nexus between those relationships and respondent's claims. *Id.* at 14a-30a.

## REASONS FOR GRANTING THE PETITION

This case presents a straightforward and developed conflict among the courts of appeals on an important and frequently recurring question of appellate jurisdiction. In

the decision below, the Fourth Circuit expressly recognized an existing conflict on the question whether 28 U.S.C. 1447(d) permits a court of appeals to review any issue encompassed in a district court's remand order where the removing defendant premised removal in part on the federal-officer or civil-rights removal statute. Nine of the courts of appeals have already weighed in on the issue, and the same issue is pending before three courts of appeals in climate-change lawsuits like the one here.

The Seventh Circuit, in an opinion by Judge Easterbrook, has held that appellate review extends to any issue encompassed in the "order remanding [the] case," 28 U.S.C. 1447(d), when the defendant has invoked one of the enumerated grounds for removal. Two other courts of appeals have recently agreed with the Seventh Circuit's reasoning despite arguably conflicting precedent in those circuits that predates this Court's decision in *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199 (1996), on which the Seventh Circuit principally relied. Six courts of appeals, including the Fourth Circuit in the decision below, have held that appellate review of remand orders is limited to consideration of only a federal-officer or civil-rights ground for removal.

The circuit conflict on the question presented is clear, and it warrants the Court's review in this case. The question is also of substantial legal and practical importance; indeed, the question is currently arising with acute frequency in climate-change lawsuits similar to this one, where the arguments for federal jurisdiction are compelling. This case is an optimal vehicle for consideration of that important question. Because this case readily satisfies the criteria for certiorari, the petition should be granted.

### A. The Decision Below Implicates A Recognized Conflict Among The Courts Of Appeals

The Fourth Circuit's decision implicates a persistent circuit conflict concerning whether 28 U.S.C. 1447(d) permits appellate review of any issue encompassed in a district court's remand order where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443. The Fourth Circuit expressly recognized that conflict, as have other courts of appeals. See App., *infra*, 8a; *Wells Fargo Bank, N.A.* v. *Dey-El*, 788 Fed. Appx. 857, 860 n.2 (3d Cir. 2019); *Lu Junhong* v. *Boeing Co.*, 792 F.3d 805, 811-812 (7th Cir. 2015); see also *City of Walker* v. *Louisiana*, 877 F.3d 563, 567 n.3 (5th Cir. 2017). That conflict warrants the Court's resolution.

1. In *Lu Junhong*, *supra*, the Seventh Circuit held that Section 1447(d) permits review of any issue encompassed in a district court's remand order. See 792 F.3d at 811. The court grounded that conclusion in the plain text of the statute, which permits appellate review of any "*order* remanding a case to the [s]tate court from which it was removed pursuant to [S]ection 1442 or 1443." 28 U.S.C. 1447(d) (emphasis added). "To say that a district court's 'order' is reviewable," the Seventh Circuit explained, "is to allow appellate review of the *whole* order, not just of particular issues or reasons." 792 F.3d at 811.

In reaching that conclusion, the Seventh Circuit also relied on this Court's decision in *Yamaha*, *supra*, which addressed whether, in an interlocutory appeal under 28 U.S.C. 1292(b), a court of appeals could review only the particular question certified by a district court or could instead address any issue encompassed in the order being certified. See 516 U.S. at 204. The Court concluded that "the appellate court may address any issue fairly included

within the certified order," not just the particular question certified. *Id.* at 205. The Court explained that the plain text of Section 1292(b) makes clear that "appellate jurisdiction applies to the *order* certified to the court of appeals[] and is not tied to the particular question formulated by the district court." *Ibid.* The Seventh Circuit interpreted Section 1447(d) in the same way, "tak[ing] both Congress and [the Court] at their word in saying that, if appellate review of an 'order' has been authorized, that means review of the 'order.'" *Lu Junhong*, 792 F.3d at 812.

That interpretation of the statutory text, the Seventh Circuit added, comports with the purpose underlying Section 1447(d)—namely, "to prevent appellate delay in determining where litigation will occur" when a case is removed to federal court. *Lu Junhong*, 792 F.3d at 813 (citing *Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 640 (2006)). The Seventh Circuit reasoned that, once Congress has permitted appellate review of a remand order, a court of appeals "has been authorized to take the time necessary to determine the right forum"; "[t]he marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small." *Ibid.* The Seventh Circuit further observed that "[t]he leading treatise" on federal jurisdiction had reached the same conclusion. *Ibid.*; see 15A Charles A. Wright et al., *Federal Practice and Procedure* § 3914.11, at 706 (2d ed. 2019) (Wright & Miller); see also 16 Daniel R. Coquillette et al., *Moore's Federal Practice* § 107.156[2][g], at 107-527 (3d ed. 2019).

2. Two other courts of appeals have recently followed the Seventh Circuit's reasoning in *Lu Junhong*, although there is arguably conflicting precedent in those circuits that predates *Yamaha*.

a. In *Decatur Hospital Authority* v. *Aetna Health, Inc.*, 854 F.3d 292 (2017), the Fifth Circuit considered whether it could review a district court's ruling that removal was untimely in a case removed in part under the federal-officer removal statute. The court held that it could. See *id.* at 295-297. The court began by noting that it "ordinarily lack[ed] jurisdiction to review a remand order based on" untimely removal. *Id.* at 296. But the defendant's reliance on the federal-officer removal statute, the court continued, "permit[ted] appellate review." *Ibid.* Relying on the reasoning in *Lu Junhong*, the Fifth Circuit explained that its authority to review the district court's timeliness ruling "flow[ed] from the text of Section 1447(d)": Congress authorized appellate review of the "order itself," rather than the "reasons *for* an order." *Ibid.* (citation omitted).

In holding that it could review the remand order, the Fifth Circuit distinguished its earlier decision in *Robertson* v. *Ball*, 534 F.2d 63 (1976). There, the Fifth Circuit addressed only the validity of removal under the civil-rights removal statute and declined to address the validity of removal under the general removal statute, 28 U.S.C. 1441. See 534 F.2d at 65. In *Decatur Hospital Authority*, the Fifth Circuit interpreted *Robertson* as precluding consideration of alternative grounds for removal but not of other defects in removal unrelated to subject-matter jurisdiction. See 854 F.3d at 296-297. The court did not elaborate on how that distinction could comport with its textual interpretation of Section 1447(d). The court did not need to resolve definitively the question whether alternative grounds for removal could be considered, however, because it concluded that the removal was in any event untimely. See *id.* at 297 & n.4; see also *City of Walker*, 877 F.3d at 566-567 nn.2-4.

b. The Sixth Circuit has also adopted the Seventh Circuit's reasoning in *Lu Junhong*. In *Mays* v. *City of Flint*, 871 F.3d 437 (2017), cert. denied, 138 S. Ct. 1557 (2018), the defendant removed the case to federal court under both the federal-officer removal statute and the general removal statute. The district court remanded the case to state court, and the defendant appealed. See 871 F.3d at 442. Citing *Lu Junhong*, the Sixth Circuit held that its "jurisdiction to review the remand order" under Section 1447(d) "also encompasses review of the district court's decision on the alternative ground for removal": *i.e.*, removal under the general removal statute. *Ibid.* The court proceeded to review both grounds for removal and ultimately affirmed. See *id.* at 442-450; see also *id.* at 450-455 (McKeague, J., dissenting) (taking the position that the case was removable under the federal-officer removal statute). In two uncited cases from decades earlier, however, the Sixth Circuit had declined to review grounds for removal other than civil-rights removal (then the only enumerated basis for appellate review of a remand order). See *Detroit Police Lieutenants & Sergeants Association* v. *City of Detroit*, 597 F.2d 566, 567 (1979); *Appalachian Volunteers* v. *Clark*, 432 F.2d 530, 534 (1970), cert. denied, 401 U.S. 939 (1971).

3. In addition to the Fourth Circuit in the decision below, five courts of appeals have held that review of remand orders under Section 1447(d) is limited to the question whether removal is appropriate under the federal-officer or civil-rights removal statutes. Notably, those courts have offered little reasoning to support their conclusion. And while most of their decisions postdate this Court's decision in *Yamaha*, none of those courts has grappled with *Yamaha*'s import.

a. In *State Farm Mutual Automobile Insurance Co.* v. *Baasch*, 644 F.2d 94 (2d Cir. 1981), the defendant removed the case under the civil-rights and general removal statutes. The district court determined that removal was untimely and remanded the case to state court. On appeal, the Second Circuit held that Section 1447(d) deprived it of jurisdiction to review the district court's ruling that removal was untimely. See *id.* at 96. But "generously assum[ing]" that the pro se defendant had presented a theory as to why removal under the civil-rights removal statute was timely, the court of appeals addressed and rejected the merits of the civil-rights ground for removal. *Id.* at 97. The court then stated that, "[i]nsofar as the appeal challenges the denial of removal under [the general removal statute], it is dismissed for want of appellate jurisdiction." *Ibid.*

b. The Third Circuit reached a similar conclusion in *Davis* v. *Glanton*, 107 F.3d 1044, cert. denied, 522 U.S. 859 (1997). There, the defendants removed the case under the civil-rights and general removal statutes, as well as the All Writs Act, 28 U.S.C. 1651. See 107 F.3d at 1046. In addressing its jurisdiction, the court of appeals observed that Section 1447(d) "expressly authorizes appellate review of remand orders in cases that were originally removed to federal court under [the civil-rights removal statute]." *Id.* at 1047. But the court concluded that "the clear text of [Section] 1447(d)" required dismissal of the appeal "for want of appellate jurisdiction" "insofar as [the defendants] challenged the district court's ruling[] under [the general removal statute]." *Ibid.* The court separately declined to grant relief under the All Writs Act. See *id.* at 1047 n.4.

c. In *Alabama* v. *Conley*, 245 F.3d 1292 (2001), the Eleventh Circuit similarly noted that, in an earlier order,

it had dismissed the appeal "to the extent that it challenge[d] the district court's remand order based on [the general removal statute]." *Id.* at 1293 n.1. But the court permitted the appeal to the extent that it challenged "the district court's implicit determination that removal based on [the civil-rights removal statute] was improper." *Ibid.* The court proceeded to consider the merits of the civil-rights ground for removal and concluded that removal was improper. See *id.* at 1299.

d. The Ninth Circuit took a similar tack in *Patel* v. *Del Taco, Inc.*, 446 F.3d 996 (2006). In that case, the district court rejected the defendant's arguments for removal under the civil-rights and general removal statutes and remanded the case to state court. Citing the language of Section 1447(d) (but without further elaboration), the Ninth Circuit stated that it had jurisdiction to review only the civil-rights ground for removal. See *id.* at 998.

e. Finally, the Eighth Circuit adopted the same approach in *Jacks* v. *Meridian Resource Co.*, 701 F.3d 1224 (2012). There, the defendant removed the case under the general and federal-officer removal statutes, as well as the Class Action Fairness Act (CAFA), 28 U.S.C. 1332(d). See 701 F.3d at 1228. The district court remanded the case, and the defendant appealed. The Eighth Circuit first resolved the CAFA ground for removal (which was independently appealable) in a separate order. See *id.* at 1228 n.2. As to the remainder of the appeal, the plaintiff contended that the court of appeals lacked jurisdiction to review the district court's ruling as to not only the general removal statute, but also (inexplicably) the federal-officer statute; the defendant contended that removal under both statutes was before the court. See *id.* at 1228-1229. The Eighth Circuit rejected both positions, concluding that,

under "the plain language of [Section 1447(d)]," its jurisdiction extended to removal under Section 1442 but not Section 1441. *Id.* at 1229.

* * * * *

In short, as matters currently stand, the Seventh Circuit has held that any issue encompassed in the remand order is subject to appellate review; the Fifth and Sixth Circuits have endorsed the Seventh Circuit's approach, despite arguably conflicting earlier precedent; and the Second, Third, Fourth, Eighth, Ninth, and Eleventh Circuits have held that only the federal-officer or civil-rights ground for removal is subject to appellate review. Given the persistence of the circuit conflict, it is unlikely to resolve itself without this Court's intervention. With such a clear conflict on an important question of federal jurisdiction, this is a paradigmatic case requiring the Court's review.

**B. The Decision Below Is Incorrect**

The court of appeals erred by holding that 28 U.S.C. 1447(d) limited the scope of its review to the question whether removal was appropriate under the federal-officer removal statute.

1. Section 1447(d) provides that "an order remanding a case to the [s]tate court from which it was removed pursuant to [S]ection 1442 or 1443 of this title shall be reviewable by appeal or otherwise." As the Seventh Circuit explained in construing that provision, "[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*, 792 F.3d at 811.

This Court's decision in *Yamaha*, *supra*, confirms the plain-language interpretation of the statute. As explained

above, see pp. 10-11, the Court there held that, in an interlocutory appeal under 28 U.S.C. 1292(b), a court of appeals may address "any issue fairly included within the certified order." *Yamaha*, 516 U.S. at 205. Relying on the plain text of Section 1292(b), the Court reasoned that "appellate jurisdiction applies to the *order* certified to the court of appeals[] and is not tied to the particular question formulated by the district court." *Ibid.*

Precisely the same reasoning applies here. Just as Section 1292(b) authorizes review of certified "order[s]," Section 1447(d) authorizes appellate review of remand "order[s]" in cases removed pursuant to the federal-officer and civil-rights removal statutes. Because there is no reason to believe that the word "order" carries different meanings in the two statutes governing appellate jurisdiction, the Seventh Circuit's "application of *Yamaha*" to Section 1447(d) was "entirely textual." *Lu Junhong*, 792 F.3d at 812. Accordingly, when a district court remands a case where removal was premised in part on one of those statutes, a court of appeals can review "any issue fairly included within" the remand "order." *Yamaha*, 516 U.S. at 205.

That result is consistent not only with the text of Section 1447(d), but also with its underlying purpose. Congress adopted the general rule limiting appellate review in Section 1447(d) in order to avoid "prolonged litigation of questions of jurisdiction" after removal. *Kircher*, 547 U.S. at 640. But once appellate review of a remand order is permitted, "there is very little to be gained by limiting review" to a ruling on a particular issue underlying the order. 15A Wright & Miller § 3914.11, at 706. At that point, the court of appeals "has been authorized to take the time necessary to determine the right forum," and "[t]he marginal delay from adding an extra issue to a case * * * is likely to be small." *Lu Junhong*, 792 F.3d at

813. Construing Section 1447(d) to limit appellate review to a particular ground for removal would serve only to insulate erroneous jurisdictional rulings from correction, with little offsetting benefit. There is no evidence in either the text or the legislative history of Section 1447(d) that Congress intended such a counterintuitive result.

2. In the decision below, the court of appeals concluded that it was bound by its earlier decision in *Noel* v. *McCain*, 538 F.2d 633 (4th Cir. 1976), to review only the federal-officer ground for removal. App., *infra*, 7a. Yet neither *Noel* nor the earlier Sixth Circuit decision on which it relied addressed the textual or policy-based arguments in favor of broader appellate review. See *Noel*, 538 F.2d at 635; *Appalachian Volunteers*, 432 F.2d at 534. Both decisions also long predate this Court's decision in *Yamaha*—as well as the Removal Clarification Act of 2011, which added the provision permitting removals under the federal-officer removal statute to Section 1447(d) without altering the subsection's reference to remand "orders." See Pub. L. No. 112-51, § 2(d), 125 Stat. 546; cf. *Cannon* v. *University of Chicago*, 441 U.S. 667, 697-698 (1979).

In following its earlier decision in *Noel*, the court of appeals suggested that *Yamaha* might be distinguishable because of the differing operation of Section 1292(b) and Section 1447(d). App., *infra*, 9a. The court observed that, while Section 1292(b) "permits appellate review of important issues before final judgment," "it does not make otherwise non-appealable questions reviewable," as does the express exception to the general rule in Section 1447(d). *Ibid.*

That is true as far as it goes, but it does not explain why the word "order" would carry a different meaning in one statute governing appellate jurisdiction than in an-

other. Also, Section 1447(d) does not limit appellate jurisdiction over remand orders merely for the sake of insulating those orders from review: Congress' goal was to avoid delay, and that goal is minimally affected by permitting review of any issue encompassed in the remand order once appellate review of the order has been authorized. See p. 11, *supra*.

In sum, the court of appeals erred by declining to review the grounds for removal asserted by petitioners other than the federal-officer ground. The Court should grant review to resolve the circuit conflict regarding the scope of appellate jurisdiction under Section 1447(d) and, on the merits, hold that appellate review extends to all issues encompassed in a remand order in a case removed in part under the federal-officer or civil-rights removal statutes. The Court would then have the option either to proceed to address the remaining grounds for removal and reverse the judgment below,[3] or to vacate the judgment and direct the court of appeals to address those grounds in the first instance.

### C. The Question Presented Is Exceptionally Important And Warrants Review In This Case

The question presented in this case is a frequently recurring one of substantial legal and practical importance. This case, which cleanly presents the question, is an optimal vehicle for the Court's review.

1. a. As a preliminary matter, the question presented squarely implicates an area of federal jurisdiction to which the Court has paid particular solicitude. In a significant number of cases since the enactment of 28 U.S.C. 1447(d), the Court has addressed various aspects of the

[3] The remaining grounds for removal were briefed at length in the court of appeals by both petitioners and respondent. See Pet. C.A. Br. 15-40, 48-54; Resp. C.A. Br. 21-53.

scope of appellate jurisdiction over remand orders. See *Carlsbad Technology, Inc.* v. *HIF Bio, Inc.*, 556 U.S. 635, 638-641 (2009); *Powerex Corp.* v. *Reliant Energy Services, Inc.*, 551 U.S. 224, 229-239 (2007); *Osborn* v. *Haley*, 549 U.S. 225, 239-244 (2007); *Kircher*, *supra*; *Quackenbush* v. *Allstate Insurance Co.*, 517 U.S. 706, 711-712 (1996); *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 127-129 (1995); *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 342-352 (1976). The Court has also long recognized the "great importance" of maintaining clear and uniform rules on issues relating to removal more generally. *Tennessee* v. *Davis*, 100 U.S. 257, 260 (1879).

The specific question presented here arises in a wide variety of contexts across the full range of civil litigation. The cases in the circuit conflict have involved the aviation industry, see *Lu Junhong*, 792 F.3d at 807; insurance and health-care plan administration, see *Decatur Hospital Authority*, 854 F.3d at 294-295; *Jacks*, 701 F.3d at 1227-1228; the drinking-water crisis in Flint, Michigan, see *Mays*, 871 F.3d at 440-442; and (as here) climate-change litigation and other matters related to the energy sector, see, *e.g.*, App., *infra*, 2a; *Parish of Plaquemines* v. *Chevron USA, Inc.*, No. 19-30492 (5th Cir.); *Parish of Cameron* v. *BP America Production Co.*, No. 19-30829 (5th Cir.).

The question presented is vitally important to defendants in civil litigation. A defendant that has properly removed a case from state court has a "right and privilege secured * * * by the [C]onstitution and laws of the United States" to proceed with the litigation in federal court. *Southern Pacific Co.* v. *Denton*, 146 U.S. 202, 207 (1892); see, *e.g.*, 28 U.S.C. 1441(a). If a district court erroneously remands the case to state court and Section 1447(d) precludes appellate review, the defendant's right to proceed in federal court will be lost. While Congress

may have been willing to accept erroneous remand orders in some circumstances in order to obtain prompt resolution of removal issues, there is little delay to be avoided once appellate review of the remand order has been authorized. See p. 11, *supra*. If an appeal is already permitted, the defendant should have the opportunity to vindicate its statutory right of removal.

If anything, the uncertainty in the lower courts on the question presented is exacerbating the delay caused by appeals of remand orders. In cases in which the defendant seeks review under Section 1447(d) of issues other than federal-officer or civil-rights removal, the plaintiff can and often does file a motion for partial dismissal of the appeal in which it seeks to litigate the question presented here. That can delay the ultimate resolution of the appeal from the remand order. See, *e.g.*, C.A. Dkt. 58, *County of San Mateo*, *supra* (No. 18-15499) (setting briefing schedule only after panel decided to carry the motion for partial dismissal with the merits); C.A. Order, *Boulder County*, *supra* (No. 19-1330) (Oct. 11, 2019) (same).

b. Resolution of the question presented is particularly important in the context of the ongoing nationwide climate-change litigation brought by state and local governments against energy companies. Like this case, a number of those cases have been removed from state to federal court; in some of those cases, district courts have entered remand orders, and those orders are now on appeal in three circuits. See *Rhode Island* v. *Shell Oil Products Co.*, No. 19-1818 (1st Cir.); *County of San Mateo* v. *Chevron Corp.*, No. 18-15499 (9th Cir.); *Board of County Commissioners of Boulder County* v. *Suncor Energy (U.S.A.) Inc.*, No. 19-1330 (10th Cir.); cf. *Parish of Plaquemines*, *supra* (addressing question presented in the context of an environmental action against energy companies); *Parish of Cameron*, *supra* (same). In some

of those cases, the remand orders were not stayed, and the parties are actively litigating the underlying cases in state court. For that reason, the resolution of the question presented in this case would be particularly timely.

2. Finally, this case is an optimal vehicle for resolution of the question presented. That question was pressed below, fully briefed by the parties, and passed on by the court of appeals. And the resolution of the question could well prove dispositive. The court of appeals' holding on the question presented led it to ignore petitioners' other compelling grounds for removal: for instance, that federal common law necessarily governs claims related to interstate air and water pollution, including claims alleging that energy companies caused injury by contributing to global climate change. Cf. *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410, 421-422 (2011); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 103 (1972).

The petition for a writ of certiorari provides the Court with an ideal opportunity to consider and resolve the question presented. That question is undeniably important, and the court of appeals' answer to the question cannot be defended. The Court should grant certiorari in this case and reverse or vacate the judgment of the court of appeals.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER LLP
*333 South Grand Street*
*Los Angeles, CA 90071*

JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
*1050 Connecticut Avenue, N.W.*
*Washington, DC 20036*

ANNE CHAMPION
GIBSON, DUNN & CRUTCHER LLP
*200 Park Avenue*
*New York, NY 10166*

*Counsel for Petitioners Chevron Corporation and Chevron U.S.A., Inc.*

DAVID C. FREDERICK
BRENDAN J. CRIMMINS
DANIEL S. SEVERSON
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
*1615 M Street, N.W., Suite 400*
*Washington, DC 20036*

*Counsel for Petitioners Shell Oil Company and Royal Dutch Shell plc*

KANNON K. SHANMUGAM
WILLIAM T. MARKS
TANYA S. MANNO
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
*2001 K Street, N.W.*
*Washington, DC 20006*
*(202) 223-7300*
*kshanmugam@paulweiss.com*

THEODORE V. WELLS, JR.
DANIEL J. TOAL
AGBEKO C. PETTY
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
*1285 Avenue of the Americas*
*New York, NY 10019*

*Counsel for Petitioners Exxon Mobil Corporation and ExxonMobil Oil Corporation*

MARCH 2020

DANIEL B. LEVIN
MUNGER, TOLLES &
OLSON LLP
*350 South Grand Avenue,*
*50th Floor*
*Los Angeles, CA 90071*

JEROME C. ROTH
ELIZABETH A. KIM
MUNGER, TOLLES &
OLSON LLP
*560 Mission Street,*
*27th Floor*
*San Francisco, CA 94105*

*Counsel for Petitioners*
*Shell Oil Company and*
*Royal Dutch Shell plc*

PHILIP H. CURTIS
NANCY G. MILBURN
ARNOLD & PORTER
KAYE SCHOLER LLP
*250 West 55th Street*
*New York, NY 10019*

MATTHEW T. HEARTNEY
JOHN D. LOMBARDO
ARNOLD & PORTER
KAYE SCHOLER LLP
*777 South Figueroa Street,*
*44th Floor*
*Los Angeles, CA 90017*

*Counsel for Petitioners*
*BP p.l.c., BP America Inc.,*
*and BP Products North*
*America Inc.*

KATHLEEN TAYLOR SOOY
TRACY A. ROMAN
CROWELL & MORING LLP
*1001 Pennsylvania*
*Avenue, N.W.*
*Washington, DC 20004*

*Counsel for Petitioners*
*CNX Resources Corporation,*
*CONSOL Energy Inc., and*
*CONSOL Marine Terminals*
*LLC*

NATHAN P. EIMER
PAMELA R. HANEBUTT
LISA S. MEYER
EIMER STAHL LLP
*224 South Michigan*
*Avenue, Suite 1100*
*Chicago, IL 60604*

ROBERT E. DUNN
EIMER STAHL LLP
*99 South Almaden*
*Boulevard, Suite 662*
*San Jose, CA 95113*

RYAN J. WALSH
EIMER STAHL LLP
*10 East Doty Street,*
*Suite 800*
*Madison, WI 53707*

*Counsel for Petitioner*
*CITGO Petroleum*
*Corporation*

MICHELLE N. LIPKOWITZ
THOMAS K. PREVAS
SAUL EWING
ARNSTEIN & LEHR LLP
*500 East Pratt Street,*
*Suite 900*
*Baltimore, MD 21202*

*Counsel for Petitioners*
*Crown Central LLC and*
*Crown Central New Holdings*
*LLC*

SEAN C. GRIMSLEY
JAMESON R. JONES
DANIEL R. BRODY
BARTLIT BECK LLP
*1801 Wewatta Street,*
*Suite 1200*
*Denver, CO 80202*

STEVEN M. BAUER
MARGARET A. TOUGH
LATHAM & WATKINS LLP
*505 Montgomery Street,*
*Suite 2000*
*San Francisco, CA 94111*

MATTHEW J. PETERS
LATHAM AND WATKINS LLP
*555 11th Street, N.W.,*
*Suite 1000*
*Washington, DC 20004*

*Counsel for Petitioners*
*ConocoPhillips and*
*ConocoPhillips Company*

MARTHA THOMSEN
MEGAN BERGE
BAKER BOTTS L.L.P.
*700 K Street, N.W.*
*Washington, DC 20001*

SCOTT JANOE
BAKER BOTTS L.L.P.
*910 Louisiana Street*
*Houston, TX 77022*

*Counsel for Petitioner*
*Hess Corporation*

SHANNON S. BROOME
HUNTON ANDREWS
KURTH LLP
*50 California Street*
*San Francisco, CA 94111*

SHAWN PATRICK REGAN
HUNTON ANDREWS
KURTH LLP
*200 Park Avenue*
*New York, NY 10166*

ANN MARIE MORTIMER
HUNTON ANDREWS
KURTH LLP
*550 South Hope Street,*
*Suite 2000*
*Los Angeles, CA 90071*

*Counsel for Petitioners*
*Marathon Petroleum Corp.*
*and Speedway LLC*

STEVEN M. BAUER
MARGARET A. TOUGH
LATHAM & WATKINS LLP
*505 Montgomery Street,*
*Suite 2000*
*San Francisco, CA 94111*

MATTHEW J. PETERS
LATHAM AND WATKINS LLP
*555 11th Street, N.W.,*
*Suite 1000*
*Washington, DC 20004*

*Counsel for Petitioner*
*Phillips 66*