No. 19-1189

IN THE

Supreme Court of the United States

BP P.L.C., ET AL., *Petitioners*,
v.
MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

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

BRIEF OF *AMICUS CURIAE* DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes

TABLE OF AUTHORITIES—Continued

Page(s)

Rules

Other Authorities

BRIEF OF *AMICUS CURIAE* DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS[1]

INTEREST OF *AMICUS CURIAE*

DRI–The Voice of the Defense Bar is an international organization of approximately 16,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. To promote these objectives, DRI, through its Center for Law and Public Policy, participates as *amicus curiae* in cases that raise issues important to its members, their clients, and the judicial system.

[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. The parties have granted blanket consent to the filing of *amicus curiae* briefs.

DRI's interest in this case arises from its support for securing defendants' rights to a federal forum and correcting trial-court errors. Cases that are removable under the federal-officer or civil-rights removal statutes may also be removable on other grounds. Full review of a remand order, not just particular grounds for that order, is important to civil defense attorneys, their clients, and the civil justice system because it ensures that cases properly removed to federal court stay in federal court.

SUMMARY OF ARGUMENT

This case presents a straightforward question: when Congress authorized appellate review of "an *order* remanding a case to the State court from which it was removed pursuant to section 1442 or 1443," 28 U.S.C. § 1447(d) (emphasis added), did it authorize appellate review of all grounds for removal at issue in the order or just the section 1442 or 1443 ground? As petitioners correctly explain, § 1447(d)'s plain text calls for plenary review.

A comparison of § 1447(d) to other statutes in the U.S. Code confirms that petitioners' plain-text reading is correct. Congress, dating to the 19th century, has enacted statutes that define an appellate court's scope of review at the level of an "order." This Court and others have understood such statutes to mean what they say: when a statute authorizes review of an "order," the entire order comes before the appellate court. By contrast, Congress has enacted statutes that limit the scope of appellate review to particular questions, which courts have properly understood to cabin their jurisdiction. Section 1447(d), which allows for appeal from an "order," falls into the former category of statutes.

Reading the statute to allow appellate review of the entirety of an order likewise comports with Congress's policy behind § 1447(d) and federal jurisdiction more generally. Congress enacted the general prohibition on review of remand orders either to relieve this Court's docket at a time when intermediate appellate courts did not exist or to hasten the resolution of removed cases. Either way, when it decided to allow appeals from orders remanding cases removed under the civil-rights or

federal-officer removal statutes, Congress set aside those interests. Congress having done so, there is no compelling basis for a court of appeals not to review a remand order in its entirety. Both experience and the possibility of sanctions suggest that the risk of frivolous assertions of the civil-rights or federal-officer removal statutes to secure the possibility of appellate review is low. And the federal interests that undergird federal jurisdiction counsel in favor of complete review.

For all these reasons, this Court should reverse the Fourth Circuit's judgment and hold that § 1447(d) authorizes complete review of a remand order in a case removed under the civil-rights or federal-officer removal statutes.

ARGUMENT

I. Appellate review of all grounds at issue in a remand order is compelled by Congress's use of the word "order" in § 1447(d).

Section 1447(d) articulates the general rule that "[a]n *order* remanding a case to the State court from which it was removed" is not reviewable on appeal. 28 U.S.C. § 1447(d) (emphasis added). It also creates an exception for certain remand orders: "[a]n *order* remanding a case to the State court from which it was removed pursuant to" the civil-rights and federal-officer removal statutes is reviewable. *Ibid.* (emphasis added). As petitioners' brief demonstrates, under a plain reading, § 1447(d) permits review of all grounds encompassed in a remand order if the case was removed, in whole or in part, under the civil-rights or federal-officer removal statutes.

Congress's choice to authorize appellate review at the level of orders, rather than particular questions or grounds, reinforces this conclusion. Section 1447(d) is syntactically indistinguishable from numerous statutes that courts have interpreted to allow for plenary appellate review. By contrast, Congress has enacted other statutes providing only for review of a particular issue or question, "clearly demonstrating that it knows how to impose such a [limitation] when it wishes to do so." *Whitfield* v. *United States*, 543 U.S. 209, 216 (2005).

A. Congress has long defined scopes of review at the level of an "order," which courts have understood to permit review of the entire order.

For more than a century, this Court and lower courts have understood that a statute permitting an appeal to be taken from an "order" authorizes, "according to its grammatical construction and natural meaning, an appeal to be taken from the whole of such . . . order." *Smith* v. *Vulcan Iron Works*, 165 U.S. 518, 524–25 (1897); see also *United States* v. *Stanley*, 483 U.S. 669, 677 (1987) ("Even if the Court of Appeals' jurisdiction is not confined to the precise question certified by the lower court (*because the statute brings the 'order,' not the question, before the court*), that jurisdiction is confined to the particular order appealed from." (emphasis added)). The exception in § 1447(d), which was first enacted as part of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 901, 78 Stat. 241, 266, is no different.[2]

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[2] Congress enacted the predecessor to § 1447(d) in 1887. Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, 553, *as amended by* Act of

a) Section 7 of the Evarts Act.

To start, Congress created the U.S. courts of appeals when it enacted the Judiciary Act of 1891, commonly known as the Evarts Act. Judiciary Act of 1891, 26 Stat. 826. Like the modern Judicial Code, the Evarts Act generally allowed for appeals only from final decisions. § 6, 26 Stat. at 828. Section 7 contained an exception for interlocutory orders granting or continuing injunctions:

> [W]here, upon a hearing in equity in a district court . . . , an injunction shall be granted or continued by *interlocutory order or decree*, . . . an appeal may be *taken from such interlocutory order or decree* granting or continuing such injunction to the circuit court of appeals . . . .

§ 7, 26 Stat. at 828 (emphasis added).

Shortly after its enactment, this Court considered whether the exception restricted appellate review "to that part of [the order] which grants the injunction," or instead allowed a court of appeals to "consider and decide the merits of the case." *Smith*, 165 U.S. at 520. It reasoned that the "grammatical construction and

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Aug. 13, 1888, ch. 866, 25 Stat. 433 (correcting errors in enrolled bill). Under then-prevailing law, remand orders were appealable to this Court. Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 470, 472; see also Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 Emory L.J. 83, 90 (1994) (reporting that, although review was not expressly authorized by statute until 1875, this Court reviewed remand orders between 1789 and 1875). The 1887 law contained no exceptions. 24 Stat. at 553. Congress enacted the modern version of § 1447(d) in 1949. Act of May 24, 1949, Pub. L. No. 81-72, § 84, 63 Stat. 89, 102. It also contained no exceptions until the passage of the Civil Rights Act of 1964.

natural meaning" of the exception—allowing an appeal from an "order"—authorized a court of appeals to consider "the whole of such interlocutory order or decree, and not . . . that part of it only which grants or continues an injunction." *Id.* at 524–25. This Court continues to apply the same reasoning in cases under 28 U.S.C. § 1292(a)(1), the successor to section 7 of the Evarts Act. E.g., *Munaf* v. *Geren*, 553 U.S. 674, 691 (2008).

b) 28 U.S.C. § 1253.

The Judicial Code contains a similar provision for appeals to this Court from injunction orders entered by a three-judge district court:

> Except as otherwise provided by law, any party may appeal to the Supreme Court *from an order* granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1253 (emphasis added). This Court has long held that § 1253 gives this Court "jurisdiction of the entire appeal," not just those claims that occasioned the convening of the three-judge district court. *White* v. *Regester*, 412 U.S. 755, 761 (1973); see also *Fla. Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73, 84 (1960) ("[T]he cases since 1925 have continued to maintain the view that if the constitutional claim against the state statute is substantial, a three-judge court is required to be convened and has jurisdiction, as do we on direct appeal, over all grounds of attack against the statute.").

c) 28 U.S.C. § 1292(b).

In general, the Judicial Code allows for appeals only from final decisions. See 28 U.S.C. § 1291; *id.* § 1292(a). Section § 1292(b) contains a limited exception to that rule. It provides, in relevant part, as follows:

> When a district judge, in making in a civil action *an order* not otherwise appealable under this section, shall be of the opinion 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, he shall so state in writing in such order. The Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken *from such order* . . . .

Id. § 1292(b) (emphasis added).

In *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199 (1996), this Court held that § 1292(b) means what it says: "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." 516 U.S. at 205. An appellate court may therefore "address any issue fairly included within the certified order because 'it is the order that is appealable, and not the controlling question identified by the district court.'" *Ibid.* (quoting 9 J. Moore & B. Ward, *Moore's Federal Practice* ¶ 110.25[1], p. 300 (2d ed. 1995)).

d) 28 U.S.C. § 1292(d)(2).

The Judicial Code contains a like provision regarding interlocutory appeals from the Court of Federal Claims to the Federal Circuit:

> [W]hen any judge of the United States Court of Federal Claims, in issuing an interlocutory *order*, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal *from that order* may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be *taken from such order* . . . .

28 U.S.C. § 1292(d)(2) (emphasis added). The Federal Circuit has long recognized that § 1292(d)(2) does not confine "the nature and scope of [its] review . . . to the certified question" but rather leaves the court "free to consider all questions material to the trial court's order." *United States* v. *Connolly*, 716 F.2d 882, 885 (Fed. Cir. 1983) (en banc).

e) 28 U.S.C. § 158(d)(2).

Similarly, under 28 U.S.C. § 158(d)(2), a court of appeals may, in its discretion, accept an appeal directly from a bankruptcy court's "judgment, order, or decree," bypassing intermediate review by the district court or bankruptcy appellate panel. A court of appeals may accept such an appeal only under certain conditions, including when either the lower courts or the parties certify, *inter alia*, that

> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance; [or]
>
> (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions.

28 U.S.C. § 158(d)(2)(i)–(ii).

Acknowledging the syntactical similarity between § 158(d)(2) and § 1292(b), all of the circuits to have addressed the question have held that § 158(d)(2) does not limit review to the particular question certified. *Franchise Servs. of N. Am., Inc.* v. *U.S. Tr.* (*In re Franchise Servs. of N. Am., Inc.*), 891 F.3d 198, 205–06 (5th Cir. 2018); *Marshall* v. *Blake*, 885 F.3d 1065, 1072 n.6 (7th Cir. 2018), *overruled on other grounds by In re Wade*, 926 F.3d 447 (7th Cir. 2019); *In re Nortel Networks Inc.*, 737 F.3d 265, 273 (3d Cir. 2013) (citing § 1292(b) precedent).

f) 5 U.S.C. § 7123(a).

Outside the context of § 1292(b) and its analogues, 5 U.S.C. § 7123(a) provides that a party may appeal a "final order" issued by the Federal Labor Relations Authority concerning an arbitration award only if "the order involves an unfair labor practice under" 5 U.S.C. § 7118. 5 U.S.C. § 7123(a)(1). The D.C. Circuit recently explained that the "most natural interpretation of this provision is that so long as the order disposes of an unfair labor practice claim . . . the court has jurisdiction to review it." *Nat'l Weather Serv. Emps. Org.* v. *Fed. Labor Relations Auth.*, 966 F.3d 875, 879–80 (D.C. Cir. 2020). And "[b]y granting

the court jurisdiction to review *the entire order*, the statute forecloses the . . . view that the court may review only the portion of the order that discusses the alleged unfair labor practice." *Id.* at 880 (emphasis added).

g) 28 U.S.C. § 1453(c)(1).

The Class Action Fairness Act of 2005 provides another example. Consistent with its stated purpose to expand federal jurisdiction so class actions may be heard in federal court, e.g., S. Rep. 109–14, at 4–5 (2005), the Act established special provisions for the removal of such cases. Among those provisions is one authorizing appeals from orders granting or denying a motion to remand:

> Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal *from an order* of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

28 U.S.C. § 1453(c)(1) (emphasis added). Three circuits have held that, because § 1453(c) gives jurisdiction over appeals from an "order," a court of appeals may consider a remand order in its entirety. *Nevada* v. *Bank of Am. Corp.*, 672 F.3d 661, 672–73 (9th Cir. 2012) ("[B]ecause § 1453(c)(1) permits appellate review of remand orders 'notwithstanding section 1447(d),' we have the discretion to entertain the issue of whether another basis for federal jurisdiction exists that would justify the district court's denial of Nevada's motion."); *Coffey* v. *Freeport*

McMoran Copper & Gold, 581 F.3d 1240, 1247 (10th Cir. 2009) (per curiam) ("There is no language [in the statute] limiting the court's consideration solely to the CAFA issues in the remand order."); *Brill* v. *Countrywide Home Loans, Inc.*, 427 F.3d 446, 451–52 (7th Cir. 2005) (same as *Bank of America*). But see *City of Walker* v. *Louisiana*, 877 F.3d 563, 567 (5th Cir. 2017) (acknowledging that circuit precedent could be read to prohibit the court "from considering an entire order when a defendant removes on both CAFA and federal question grounds"); *Anderson* v. *Bayer Corp.*, 610 F.3d 390, 394 (7th Cir. 2010) (concluding that the court lacked jurisdiction to consider an alternative ground for federal jurisdiction after determining that the case was not a class action under CAFA); *Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC* v. *Countrywide Fin. Corp.*, 603 F.3d 23, 27–28 (2d Cir. 2010) (same, after determining that a CAFA exception applied).

B. When Congress intends to limit review to particular questions, it says so explicitly.

By contrast, when Congress wishes to limit the scope of review of a particular decision, it expresses that wish clearly.

a) 28 U.S.C. § 1254.

To begin, although cases most often come before this Court by writ of certiorari, the Judicial Code provides an alternative path. This Court may review a case in a court of appeals

> [b]y *certification* at any time by a court of appeals *of any question of law* in any civil or criminal case as to which instructions are desired, and upon such certification the

> Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1254(2) (emphasis added). This Court has long recognized that the default rule under this provision is that "[n]othing can come before this Court . . . except such *single definite questions* as shall actually arise and become the subject of disagreement in the Court below, and be duly certified here for decision." *United States* v. *Barnett*, 376 U.S. 681, 689 n.6 (1964) (emphasis added) (quoting *Ward* v. *Chamberlain*, 67 U.S. 430, 434–35 (1862)); accord *Cleveland-Cliffs Iron Co.* v. *Arctic Iron Co.*, 248 U.S. 178, 180 (1918) (the statute may not be used "to become the instrument by which the division of powers made by the statute would be disregarded"); see also S. Ct. R. 19. All other matters "remain in the Court below to be determined by the Circuit Judges." *Barnett*, 376 U.S. at 689 n.6.

b) 38 U.S.C. § 7292.

Congress has narrowly circumscribed the scope of the Federal Circuit's jurisdiction and review of decisions of the Court of Appeals for Veterans Claims (the "Veterans Court"). Under 38 U.S.C. § 7292(c), the circuit has "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." 38 U.S.C. § 7292(c). Section 7292(d) further provides that, in such appeals, the Federal Circuit "shall decide all relevant questions of law" and, "[e]xcept to the extent that an appeal . . . presents a constitutional issue, . . . may *not* review

(A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. § 7292(d)(1)–(2) (emphasis added).

The Federal Circuit construes these statutes to limit its review of a Veterans Court decision only to questions of law unless the case presents a constitutional issue. E.g., *Conway* v. *Principi*, 353 F.3d 1369, 1372 (Fed. Cir. 2004) ("[W]hile we can review questions of law, we cannot review applications of law to fact.").

c) 28 U.S.C. § 1295(a)(7).

Congress also has circumscribed the Federal Circuit's jurisdiction to review certain tariff-related findings by the Secretary of Commerce. In that context—and unlike in other contexts specified in the same statute[3]—the Federal Circuit's jurisdiction is limited to reviewing "questions of law only." 28 U.S.C. § 1295(a)(7). The Federal Circuit has held that, because it may review only questions of law, its review of the facts is highly circumscribed. *Univ. of N.C. at Chapel Hill* v. *U.S. Dep't of Commerce*, 701 F.2d 942, 944 (Fed. Cir. 1983) (citing *Univ. of Cincinnati Med. Ctr.* v. *U.S. Dep't of Commerce*, 537 F.2d 518, 522 (C.C.P.A. 1976)).

d) 52 U.S.C. § 30110.

The Federal Election Campaign Act contains an expedited review procedure for "questions of

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[3] For instance, the statute gives the Federal Circuit jurisdiction over "final decision[s]" of the U.S. Court of International Trade and "final determinations" of the U.S. International Trade Commission. 28 U.S.C. § 1295(a)(5)–(6).

constitutionality" regarding the Act. It provides that certain parties

> may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all *questions of constitutionality* of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

52 U.S.C. § 30110. This provision has been interpreted to give the en banc courts of appeals jurisdiction only over nonfrivolous constitutional challenges to the Act. See *Cal. Med. Ass'n* v. *Fed. Election Comm'n*, 453 U.S. 182, 192 n.14 (1981) ("[W]e do not construe § 437h to require certification of constitutional claims that are frivolous . . . or that involve purely hypothetical applications of the statute . . . or in cases where the resolution of such questions required a fully developed factual record."); *Wagner* v. *Fed. Election Comm'n*, 717 F.3d 1007, 1012 (D.C. Cir. 2013) (statute vests exclusive original jurisdiction to hear the merits of constitutional challenges to the FECA in the en banc court of appeals); *Khachaturian* v. *Fed. Election Comm'n*, 980 F.2d 330, 331 (5th Cir. 1992) (en banc) (per curiam) ("If no colorable constitutional claims are presented on the facts as found by the district court, it should dismiss the complaint. If it concludes that colorable constitutional issues are raised from the facts, it should certify those questions to us."); *Fed. Election Comm'n* v. *Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 51 (2d Cir. 1980) ("[T]he usual en banc jurisdiction

vested in us by [§ 30110] is limited to 'questions of constitutionality' . . . .").

e) 42 U.S.C. § 8514.

A similar expedited review procedure exists under the Emergency Energy Conservation Act of 1979, which allows states to challenge certain actions taken by the President or the Secretary of Energy. In such circumstances,

> [t]he district court shall determine the questions of law and upon such determination certify such questions immediately to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

42 U.S.C. § 8514(a)(2). Although no court has interpreted the scope of review under the statute, there is little reason to think a court would interpret it any differently from the foregoing statutes, each of which limit the appellate court's review to particular questions, not an entire order or case.

* * *

The foregoing examples illustrate that Congress knows how to limit the scope of appellate review when it so desires. Congress has enacted statutes authorizing an appeal from an "order" since well before it passed the civil-rights and federal-officer exceptions in § 1447(d). For nearly as long, courts have understood that such statutes confer appellate jurisdiction over an entire order, not just particular questions or arguments contained therein. The word "order" as used in § 1447(d) should carry the same meaning.

II. Appellate review of all grounds at issue in a remand order is compatible with Congress's policy in enacting § 1447(d).

Plenary review of a remand order not only is consistent with Congress's use of the word "order" but also is compatible with its policy. There is good reason to think that Congress originally enacted the prohibition on appellate review of remand orders to relieve this Court's docket[4] following the Reconstruction-era expansion of federal jurisdiction. See Wasserman, *supra*, at 100–02 (discussing background to the enactment of the predecessor to § 1447(d)). Nonetheless, the modern understanding is that Congress enacted the prohibition "to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues." *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 351 (1976), *abrogated in part on other grounds by Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706 (1996). Regardless, there is no evidence that Congress enacted § 1447(d) because it thought remand orders were categorically undeserving of appellate review. Plenary review in cases removed in part under the civil-rights or federal-officer removal statutes therefore does not upset Congress's policy in enacting the statute.

To be sure, appellate review of a remand order adds to the courts of appeals' dockets and may slow the resolution of remanded cases. But in cases involving the civil-rights or federal-officer removal statutes, Congress already has made the decision to

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[4] As noted earlier, Congress originally enacted the prohibition on review of remand orders in 1887, four years before it created the courts of appeals. See *supra* note 2. Accordingly, at the time, appeals from remand orders went directly to this Court.

subordinate those interests to a defendant's interest in securing a federal forum. Having made that decision, it is only logical for a court of appeals to consider all potential grounds for removal and ensure that the case proceeds in the right court.

To start, declining to review all grounds for removal would yield few, if any, practical benefits. As courts and commentators recognize, "[t]he marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small." *Lu Junhong* v. *Boeing Co.*, 792 F.3d 805, 813 (7th Cir. 2015); accord 15A Charles Alan Wright et al., *Federal Practice & Procedure* § 3914.11 (2d ed.) (same). One circuit worries that "adding more complex federal jurisdictional issues to the appellate docket" may cause delay. *Bd. of Cty. Comm'rs of Boulder Cty.* v. *Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 817 (10th Cir. 2020). But it stands to reason that, at least in some cases, plenary review may actually speed up appellate decision making by opening up additional bases for reversal, some of which may be easier to resolve than the questions presented by the federal-officer or civil-rights removal statutes. Cf. *Edwardsville Nat'l Bank & Tr. Co.* v. *Marion Labs., Inc.*, 808 F.2d 648, 651 (7th Cir. 1987) ("[O]nce the interlocutory appeal has been accepted and the case fully briefed, it may be possible to decide the validity of the order without regard to the question that prompted the appeal.").

On the other hand, there is much to be gained by plenary review and the concomitant correction of erroneous jurisdictional rulings. "[A] federal court's 'obligation' to hear and decide a case" within its jurisdiction "is 'virtually unflagging.'" *Sprint*

Commc'ns, Inc. v. *Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colo. River Water Conserv. Dist.* v. *United States*, 424 U.S. 800, 817 (1976)). And it goes without saying that weighty federal interests undergird federal jurisdiction even outside the civil-rights and federal-officer removal contexts. See, e.g., *Merrell Dow Pharm. Inc.* v. *Thompson*, 478 U.S. 804, 826–27 (1986) (federal-question jurisdiction promotes uniformity and provides a forum that is more likely to correctly apply federal law); *Ableman* v. *Booth*, 62 U.S. 506, 520 (1858) (without federal jurisdiction over federal claims, "conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences"); *Hertz Corp.* v. *Friend*, 559 U.S. 77, 85 (2010) (noting "diversity jurisdiction's basic rationale, namely, opening the federal courts' doors to those who might otherwise suffer from local prejudice against out-of-state parties").

Indeed, plenary review is consistent with Congress's policy in enacting the exceptions for civil-rights and federal-officer cases. Congress enacted those provisions to ensure that such cases were not stuck in an inhospitable state forum hostile to federal rights and interests. See, e.g., 110 Cong. Rec. 6,955–56 (1964) (statement of Sen. Dodd, floor manager for remand-order appeal provision in the Civil Rights Act of 1964); H.R. Rep. 112-17, at 1, 4 (2011) (Judiciary Committee report on the Removal Clarification Act of 2011). Given its solicitude for keeping such cases in federal court, it is unlikely that Congress intended to bar the appellate door to other potentially meritorious grounds for federal jurisdiction if a defendant's assertion of the civil-rights or federal-officer removal statutes was colorable, if ultimately unsuccessful.

Nor is there any reason to think that allowing for complete review of remand orders will result in a flood of frivolous assertions of the civil-rights or federal-officer removal statutes to preserve the possibility of appellate review. The experience in the Seventh Circuit, which has explicitly endorsed plenary review for the longest period among the circuits (for approximately five years, after it decided *Lu Junhong*), shows just the opposite. In that period, defendants in the Seventh Circuit have filed *zero* notices of removal citing the civil-rights removal statute and only *six* notices of removal citing the federal-officer removal statute.[5] Only three of those cases resulted in appeals from remand orders. Notably, all of them addressed only the federal-officer removal statute and concluded that the defendant *validly asserted it*. *Baker* v. *Atl. Richfield Co.*, 962 F.3d 937 (7th Cir. 2020); *Betzner* v. *Boeing Co.*, 910 F.3d 1010 (7th Cir. 2018); *Hammer* v. *U.S. Dep't of Health & Human Servs.*, 905 F.3d 517 (7th Cir. 2018).

The available sanctions for frivolous assertions of the federal-officer and civil-rights removal statutes suggest that this pattern is likely to continue. *Lu Junhong*, 792 F.3d at 813. Both the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure allow courts to impose sanctions for frivolous claims, Fed. R. Civ. P. 11(c); Fed. R. App. P. 38, and § 1447 itself provides that a remand order may require the payment of costs and expenses, including attorney fees, 28 U.S.C. § 1447(c). Further, the universe of defendants who plausibly may invoke

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[5] *Amicus curiae* determined these figures by reviewing citing references for the civil-rights and federal-officer removal statutes reported on Westlaw in documents filed in the district courts located in the Seventh Circuit.

the civil-rights or federal-officer removal statutes is small, and it grows smaller with each appellate decision clarifying the scope of the statutes. For all these reasons, the fear of frivolous removal arguments "should be put aside against the sorry possibility that experience will give it color." Wright et al., *supra*, § 3914.11.

In short, because Congress has subordinated the interests served by the general prohibition on appellate review in the context of the civil-rights and federal-officer removal statutes, no compelling policy arguments counsel against reviewing all grounds at issue in an appealable remand order. To the contrary, complete review would serve the federal interests undergirding federal jurisdiction and ensure that cases properly removed to federal court stay in federal court.

CONCLUSION

For the foregoing reasons, the Court should reverse the Fourth Circuit's judgment and hold that § 1447(d) authorizes complete review of a remand order in a case removed under the civil-rights or federal-officer removal statutes.

Respectfully submitted,

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