SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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BP P.L.C., ET AL.,)
Petitioners,)
v.) No. 19-1189
MAYOR AND CITY COUNCIL OF)
BALTIMORE,)
Respondent.)

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Washington, D.C.

Tuesday, January 19, 2021

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:24 a.m.

APPEARANCES:
KANNON K. SHANMUGAM, ESQUIRE, Washington, D.C.;
    on behalf of the Petitioners.
BRINTON LUCAS, Assistant to the Solicitor General,
    Department of Justice, Washington, D.C.;
    for the United States, as amicus curiae,
    supporting the Petitioners.
VICTOR M. SHER, ESQUIRE, San Francisco, California;
    on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:24 a.m.)

CHIEF JUSTICE ROBERTS: We will now hear argument in Case 19-1189, BP P.L.C. versus the Mayor and City Council of Baltimore.

Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM

ON BEHALF OF THE PETITIONERS

MR. SHANMUGAM: Thank you, Mr. Chief Justice, and may it please the Court:

This case presents a question of statutory interpretation involving the provision authorizing appellate review of certain remand orders. The relevant provision of Section 1447(d) authorizes appellate review of a remand order where a ground for removal was the federal officer or civil rights removal statute.

By its plain terms, the statute permits review of the entire order, not particular issues. The court of appeals' contrary interpretation is invalid.

Respondent offers virtually no textual defense of that interpretation, relying instead on case law, policy, and an alternative interpretation. But those arguments cannot

trump the statutory text and, in any event, lack merit.

As to case law, this Court and the courts of appeals have consistently interpreted statutes permitting appellate review of an order to authorize plenary review, and Respondent's two contrary examples involve unique considerations.

As to policy, the plain text interpretation is consistent with Congress's special solicitude for cases involving civil rights and federal officers. That interpretation accords with the background principle of plenary review, would lead, at most, to marginal additional delay, and could actually expedite resolution of the appeal.

And as to Respondent's alternative interpretation, a defendant removes a case pursuant to the federal officer removal statute when it invokes the statute in its notice of removal, regardless of the merits of that ground.

The sole remaining question is how best to dispose of this case. The Court should reverse the judgment below because Respondent's

claims necessarily arise under federal law.

This Court's precedents dictate the commonsense conclusion that federal law governs claims alleging injury caused by worldwide greenhouse gas emissions. The court of appeals should have reached that ground for removal, and it should have held that the case was removable on that basis. The court of appeals' judgment should therefore be reversed.

I welcome the Court's questions.

CHIEF JUSTICE ROBERTS: Counsel, you just said that the -- your theory applies regardless of the merits of the federal officer or the federal civil rights basis for removal. But what if the -- those bases are frivolous, that everybody who wants to keep their case in federal court will put in as many grounds for removal as they can, and they have to -- all they have to do is tack on one of these federal officer or federal civil rights grounds? Is that right?

MR. SHANMUGAM: In that circumstance, sanctions and fee awards would be available, as they always are, whenever a litigant makes frivolous argument, and a party could be subject

to sanctions up to dismissal.

Mr. Chief Justice, I don't think there's any evidence that parties engage in that conduct. In the circuit that most clearly has adopted our rule, the Seventh Circuit, there's simply no evidence of that. And I would --

CHIEF JUSTICE ROBERTS: Well, what if it's --

MR. SHANMUGAM: -- point the Court --

CHIEF JUSTICE ROBERTS: -- what if it's beyond frivolous? What if the court of appeals just says, you know, I think we ought to look at this, and if they're -- it turns out they're wrong about the federal officer basis, we'll just send it back and we don't have to consider all these other possible grounds?

MR. SHANMUGAM: Well, I don't think that a court can do that because the statute obligates an appellate court to consider all of the grounds for removal. And it contemplates a situation like this, where the federal officer or civil rights ground may not have merit. That is why the use of the word "order" is so significant.

And to adopt Respondent's

interpretation, Congress would have had to make clear that the question or issue of federal officer or civil rights removal was all that was available on appeal. And Congress obviously did not do that.

CHIEF JUSTICE ROBERTS: Justice Thomas.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

Mr. Shanmugam, the -- I'd like to -- I may have missed your last point. Did you say that even if the order or the bases offered by the moving party is frivolous, that it would still have to be considered?

MR. SHANMUGAM: No. I think, in that circumstance, the court of appeals would have the power to impose sanctions, and those sanctions would include dismissal of the appeal.

I was addressing only --

JUSTICE THOMAS: I think that's -- that's -- again, I heard you say that to the Chief Justice, but why would that even be a basis for review? I think that's what we're getting at, as opposed to the sanctions.

MR. SHANMUGAM: So I think that an

alternative option that would be available to the Court would be to say, on a ground much like that that the Court adopted in Bell versus Hood, that where the federal officer or civil rights ground is frivolous, there is no appellate jurisdiction.

But I think our principal submission would be that sanctions and fee awards are available where that ground is frivolous. My last point to the Chief Justice, Justice Thomas, was simply that where the ground is not frivolous but simply is found to have lacked merit, as, indeed, the court of appeals did in this case, the court of appeals nevertheless has to address the other grounds, and that is because the order that is under review necessarily encompasses all of the grounds for removal that were asserted in the notice of removal.

JUSTICE THOMAS: Just so -- just that I -- just so that I'm clear, you're saying that the courts -- once the order is appealed, that the appellate courts have no discretion to consider grounds that were not the basis for the removal -- for the appeal?

MR. SHANMUGAM: Well, the court would have the power to consider all of the grounds asserted in the notice of removal, and that is because what is before the court is the order, that is, the command remanding the case to state court.

And one benefit of our interpretation is that it gives the court of appeals flexibility in the other direction. If the court of appeals concludes that there is an easier ground than federal officer removal on which to reverse, it can do so.

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Breyer.

JUSTICE BREYER: Well, one concern would be that if you are right, that in considering removal, a defendant will add grounds, federal officer or civil rights. There are -- there's a big difference between frivolous and meritorious. It's called uncertainty and possible and who knows. So they'll add, on those grounds, it will get over to the federal court. The federal court will say that it -- it's not frivolous, but it's

wrong, and, therefore, they will appeal on everything. And that means added time, added delay, in a statute, the point of which, no appeal, is to cut down on the time and delay caused by appeal.

MR. SHANMUGAM: Just --

JUSTICE BREYER: So what?

MR. SHANMUGAM: Justice Breyer, I would say two things in response to that.

First, in response to the specific concern about abuse, I do think it's important to keep in mind that the federal officer and civil rights removal statutes are relatively narrow. It is certainly not going to be every civil defendant who is going to be able plausibly to invoke those statutes.

And, again, there's no evidence of gamesmanship or abuse in the circuit that --

JUSTICE BREYER: No, I'm not saying --

MR. SHANMUGAM: -- has most clearly adopted --

JUSTICE BREYER: -- I'm only saying, is there -- the evidence point I've got, that's a good point. The -- the -- is there anything else to say in -- in the ground where you're a

lawyer in your office and you say, ah, this isn't really much, ah, blah blah blah, but we better stick it in in case we want an appeal. You're not saying it's nothing.

MR. SHANMUGAM: Well, I think --

JUSTICE BREYER: It's not something either.

MR. SHANMUGAM: -- Justice Breyer, I think that would take me to my second point, which is, would it have been reasonable for Congress to have made this policy determination? And I would respectfully submit that it would have been.

And, again, we have no legislative history that even speaks to this issue. Our primary submission is that the text is clear, but I think that Congress could well have concluded that in light of the significant federal interests that are often in play in these cases, that even in circumstances in which the civil rights or federal officer ground is ultimately found not to have been meritorious, that Congress, balancing the risk of erroneous remand against the risk of incremental delay, could have struck the balance to permit plenary

review, consistent with the ordinary way that appellate review operates.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

JUSTICE SOTOMAYOR: Counsel, you're talking about what Congress -- balance Congress could have chosen. But I go to the fact that when Congress added 1443 to this statute, every circuit court who had addressed this issue had already ruled that the only thing that was subject to review was a -- a decision based on 1442 and had rejected your argument.

Don't you think that if I'm trying to figure out what Congress intended that I would look to what was before Congress's understand -- under -- in front of Congress in its understanding, number one?

Number two, that when it told me that it didn't want appellate review of all issues and that it only wanted appellate review of 1442 and 1443 issues, that our review should be limited to what it wanted? I mean, I do --

MR. SHANMUGAM: Justice Sotomayor --

JUSTICE SOTOMAYOR: -- I do know that we have some of my colleagues who believe that

exceptions should not be read narrowly. I don't happen to be one of them, but even if I read "order" -- you know, "order" the way you want, I don't think I can read it in isolation. And I think those two other factors make me believe that what Congress intended is not what you say.

MR. SHANMUGAM: Justice Sotomayor, with regard to ratification, first, the law was hardly settled at the time of the 2011 amendment. It is certainly true that several circuits had adopted Respondent's interpretation, but they did so with conclusory reasoning, and most of them predated this Court's decision in Yamaha, where the Court construed a statute using materially identical language in the opposite direction.

JUSTICE SOTOMAYOR: Except that --

MR. SHANMUGAM: Second --

JUSTICE SOTOMAYOR: -- Yamaha had already been decided, counsel, and despite that, those circuit courts were ruling against you.

MR. SHANMUGAM: Well, I think most of the circuit decisions that Respondent invokes predated Yamaha. There were a few that postdated it. But our submission is simply that

Yamaha ought to be taken into account.

In addition, Congress merely added two words. It did not reenact the entire provision. It didn't make comprehensive amendments. And it's hard to say with any confidence that Congress's failure to speak more clearly reflects approval of those preexisting circuit decisions.

CHIEF JUSTICE ROBERTS: Justice Kagan.

JUSTICE KAGAN: Mr. Shanmugam, when you were talking with the Chief Justice and Justice Thomas about frivolous cases, you seemed to want to rely on sanctions rather than a -- a kind of Bell v. Hood rule.

And I'm -- I'm -- I'm wondering, why isn't a Bell v. Hood rule that says that the Court has no jurisdiction with respect to frivolous assertions of that kind -- why isn't that the better way to go?

MR. SHANMUGAM: I think that option is available to the Court, Justice Kagan, as we said in our brief. And if the Court thinks that sanctions and fee awards would be insufficient in this context, knowing that that is what the Court ordinarily relies on to deter improper

conduct by litigants, I think that the Court could adopt a Bell versus Hood-like rule.

And, again, if there were more evidence that this was a problem -- and Respondent does not cite a single example of the sort of gamesmanship that it posits -- then perhaps the Court should take that further step.

But, again, as this Court recognized, for instance, in Arthur Andersen in the context of appeals in the arbitration context, sanctions and fee awards paradigmatically would apply in a situation like this where a party is advancing a frivolous argument and doing that for an improper purpose, namely, for the purpose of establishing appellate jurisdiction where there otherwise would not be any.

And whether that's a matter of statutory fee-shifting or sanctions, Rule 11 sanctions, or even the use of a court's inherent authority, again, the sanction of dismissal would be available, dismissal of the appeal, and I think that that would suffice to deal with those situations.

JUSTICE KAGAN: Thank you very much.

CHIEF JUSTICE ROBERTS: Justice

Gorsuch.

JUSTICE GORSUCH: I -- I -- I'd like to press on the Bell versus Hood argument a little bit from the other direction. Isn't it a little bit odd to police jurisdiction based on whether an argument is frivolous or not? Wouldn't that seem to be more of a merits determination in the first instance?

And for -- for a party arguing that we need to follow the strict language of the statute with respect to our jurisdiction of orders, I'm -- I'm -- I'm -- I'm not sure I understand where -- where this authority to dismiss for lack of jurisdiction, frivolous arguments, might -- might emanate, what penumbra it emanates from?

MR. SHANMUGAM: Justice Gorsuch, as I'm sure you're aware, the Bell versus Hood rule has been criticized, including, I believe, by Chief Justice Rehnquist, on precisely that ground, and I think it's really a matter for the Court to decide whether it --

JUSTICE GORSUCH: Well, counsel, I wouldn't --

MR. SHANMUGAM: -- can slide in there.

JUSTICE GORSUCH: -- I mean, you know, you're -- you're as familiar with those criticisms as I am and yet you press the point. So I don't think you can press the point and then say: Well, I don't know, the Court can do whatever it wants. I mean, you -- you surely have to take a position here.

MR. SHANMUGAM: Well, I -- I -- my submission is simply that the Court may wish to consider that, but its decision on whether or not to consider that obviously depends on the Court's view on the underpinnings of the Bell versus Hood case.

JUSTICE GORSUCH: Oh, okay. So here's this crazy rule that -- that, you know, you guys made up, and you can continue to make it up if you want, and I -- I express no views.

Is that -- is that --

MR. SHANMUGAM: Well, the Court can --

JUSTICE GORSUCH: -- is that where we are?

MR. SHANMUGAM: I -- I just want to be clear. The Court has repeatedly reaffirmed that rule. It would require an extension of that rule, which applies in the context of a federal

district court's jurisdiction, to this different context.

And so were the Court to do that, it would have to first conclude that it is comfortable with the underpinnings of the rule and, second, I think, conclude that sanctions and fees would be insufficient.

And our front-line submission, Justice Gorsuch, is there's no reason to think that those would not be sufficient in this context.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE KAVANAUGH: Thank you, Chief Justice.

Good morning, Mr. Shanmugam. I think a problem for you here is the ratification doctrine that Justice Sotomayor raised, and best I can tell, all the courts of appeals had not adopted this reading as of 2011, that no court had deviated from that interpretation.

You know, what are -- what are we to do with that? Is it -- are we to say that the ratification doctrine really doesn't have that much force, which, you know, I think it sometimes is overused, just speaking for myself,

or how are we to get around that here if -- from -- from your perspective of trying to convince us to adopt your position?

MR. SHANMUGAM: I -- I -- I think, Justice Kavanaugh, that this Court can apply its existing precedents on the ratification doctrine and comfortably still rule in our favor.

And I made two points in response to Justice Sotomayor, the first, that the law was hardly settled and that at a minimum, in considering the --

JUSTICE KAVANAUGH: It was --

MR. SHANMUGAM: -- state of the law --

JUSTICE KAVANAUGH: -- it was settled. It was settled. There were a lot of court of appeals. No one had gone the other way.

MR. SHANMUGAM: But I think that is only true if you take a very narrow view of the relevant question for ratification purposes. And, again, I think, at a minimum, you have to take Yamaha into account because it was this Court's most recent pronouncement involving materially identical statutory language.

JUSTICE KAVANAUGH: So -- so --

MR. SHANMUGAM: And this Court has

made --

JUSTICE KAVANAUGH: Go ahead.

MR. SHANMUGAM: I was just going to say, and this Court has made clear that where decisions have only conclusory reasoning, they are not entitled to significant weight in the ratification analysis --

JUSTICE KAVANAUGH: Well, I have a second question --

MR. SHANMUGAM: -- and it was really holding --

JUSTICE KAVANAUGH: Sorry, I have to jump in to get a second question, which is why do you want to be in federal court rather than state court?

MR. SHANMUGAM: Well, I think simply because we believe that the claims here arise under federal law, and the easiest basis for that is the federal common law ground that the court of appeals did not reach because of its resolution of the question presented.

We believe the answer on that question is dictated by this Court's precedents and that federal jurisdiction is therefore mandated here.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett.

JUSTICE BARRETT: Well, Mr. Shanmugam, let me pick up where you just left off. Don't you think it would be fairly aggressive for us to resolve the federal common law question here, assuming that we agreed with you on the antecedent removal point?

MR. SHANMUGAM: I don't think so, Justice Barrett, because that issue really goes to the appropriate disposition in this Court, whether the Court should simply vacate and remand or reverse outright. And that issue is fully briefed here. And we believe that the answer is clear under this Court's long-standing precedents.

And there's also, I think, a very significant prudential reason for the Court to reach that issue because, as you are aware, there are some 20 of these cases pending nationwide in courts around the country, and, indeed, there are a number of cert petitions in follow-on cases that are currently pending before this Court.

And I think, in light of all of those

considerations, it would be appropriate for the Court to resolve that question. And the answer to that question is clear, because this Court, for more than a century, has applied federal common law to claims seeking redress for interstate pollution, including most notably in AEP with regard to very similar nuisance claims alleging injury from global climate change.

JUSTICE BARRETT: Mr. Shanmugam --

MR. SHANMUGAM: And as a matter --

JUSTICE BARRETT: -- let me -- let me interrupt you there and circle back to the congressional ratification point. You know, as Justice Kavanaugh pointed out, the circuits were against you. They had adopted the opposite position. You pointed out in your brief that the leading treatise, Wright and Miller, had criticized that rule.

Should we factor that in at all into our analysis, that there was some criticism of the rule even though it didn't come from courts?

MR. SHANMUGAM: I think that's a relevant factor. And I think the government agrees -- and Mr. Lucas can speak to that as well -- but, ultimately, of course, it's the

case law that drives the analysis.

And when you have a unanimous, clear decision from this Court construing materially identical language in court of appeals decisions that really had very conclusory, if any, reasoning, I think that the law was unclear.

And when you add onto that that all that Congress did here was merely to add two words, "1442 or," I don't think that you can conclude that there is ratification, particularly when you go back to the original version of 1447(d) in the Civil Rights Act, where Congress was plainly very concerned about the risk of local prejudice.

I think that the Court should not blind itself to that context in making this interpretive decision.

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: A minute to wrap up, Mr. Shanmugam.

MR. SHANMUGAM: Thank you, Mr. Chief Justice.

So, as we've been discussing, we believe that the plain language of Section 1447(d) resolves the question permitted

-- presented and -- and really does permit an appellate court to review the entirety of a remand order where a ground for removal was the federal officer removal statute.

But we do also respectfully submit that the Court should proceed to ensure that this case and the many others like it proceed in federal court. There is something profoundly counterintuitive about the notion that these cases which seek relief for injuries caused by worldwide greenhouse gas emissions should be litigated in state courts under the laws of different states.

This Court has long made clear that, as a matter of constitutional structure, such claims necessarily arise under federal law. The United States has agreed with that proposition. And resolving that issue now will preserve the resources of the judiciary and the parties and ensure the orderly resolution of these cases.

And, accordingly, this Court should not simply vacate but reverse the court of appeals' judgment.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you,

counsel.

Mr. Lucas.

ORAL ARGUMENT OF BRINTON LUCAS

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONERS

MR. LUCAS: Thank you, Mr. Chief Justice, and may it please the Court:

This Court should hold that Section 1447(d) means what it says. There is simply no natural way to read the phrase "an order remanding a case" as part of an order remanding a case. Therefore, once Section 1447(d) authorizes an appeal of a remand order, there's no basis for artificially limiting the scope of that appeal to a particular question.

Respondent resists that straightforward reading but never denies that its approach would give the phrase "an order remanding a case" different meanings in two back-to-back clauses of the same sentence. Instead, Respondent pivots to a novel textual theory in its merits brief based on the phrase "removed pursuant to."

But that argument can't be squared with how removal actually works. At the end of

the day, Respondent's arguments are really about policy, namely, a legislative desire to prevent delay. But, when Congress has already authorized an appeal of a remand order, considering multiple issues is unlikely to prolong litigation much further and may, in fact, expedite it.

I welcome the Court's questions.

CHIEF JUSTICE ROBERTS: Counsel, I would like to get back to the question I asked your friend previously. Is the appellate court required to consider those additional grounds for removal or simply permitted to do so?

Not with respect to whether the federal officer ground is -- is frivolous, but let's say they just look at that first and they determine it wasn't frivolous, but it just happens to be wrong, and, therefore, we don't have to look at the other bases.

MR. LUCAS: I don't think in that context, Your Honor, whether this was not a frivolous or a bad-faith assertion of federal officer removal, that an appellate court could simply close its eyes to questions that were presented and that a defendant had the right to

appeal.

So, no, I don't think in that context they could. But, in cases where there is actually abuse, I think, as Petitioner explained, one of the remedies available for such abuse of appellate process would be a dismissal of the entire appeal.

CHIEF JUSTICE ROBERTS: Are there any grounds on which your position differs from that of the Petitioner?

MR. LUCAS: With respect to the question presented, I don't think so, Your Honor. I think we think that the statute here means what it says and that it's just implausible to read the words "order remanding a case" to mean a portion of that order remanding a case.

CHIEF JUSTICE ROBERTS: What about --

MR. LUCAS: And I --

CHIEF JUSTICE ROBERTS: -- what about on the remedy?

MR. LUCAS: On the remedy, we haven't taken a position. We think the Court could address the issue in this case, and we think that's important, the federal common law issue.

We think it's an important question that the Court will need to resolve at some point or another, but we haven't taken a position on whether the Court should use its discretion to decide it here.

But whatever this Court decides to do with that issue, we do think that it should confirm that Section 1447(d) permits appellate review of orders rather than issues.

CHIEF JUSTICE ROBERTS: Justice Thomas.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

Mr. Lucas, the -- you may be right, may or may not be right, on the statutory reading of this, but there seems -- there's an odd -- I can't avoid the odd sense that it seems as though we are smuggling in -- smuggling into review, appellate review, of other issues that are not necessarily the issues that are front and center like federal officer.

Could you somehow help me to eliminate that sense of awkwardness?

MR. LUCAS: Certainly, Justice Thomas. I would point you to the fact that this really

isn't that unusual. I think, in other contexts, the baseline is really what triggers appellate review doesn't necessarily define the scope of that review.

And I think Yamaha is a good example. So, there, this Court declined to answer the question that was certified in the interlocutory order because it was based on an incorrect premise. And had this Court taken an approach similar to the one Respondent advocates here, it would be left with essentially adjudicating a question that didn't really matter because it rested on the wrong foundation.

And I think you can see this in other contexts, such as with respect to the review of interlocutory orders concerning injunctions or even with this Court's direct review over three-judge district court injunctions.

JUSTICE THOMAS: And I know you said that you're not going to take a position or the government is not taking a position on whether or not we should get to the -- the federal common law issue, but do you have an opinion on where -- whether or not such a -- there is a federal common law principle on climate change

injuries?

MR. LUCAS: Yes, Your Honor, we do think that Respondent's claims are inherently federal in nature. And although Respondent, like the plaintiffs in the Ninth Circuit Oakland case, has tried to plead around this Court's decision in AEP, its case still depends on alleged injuries to the City of Baltimore caused by emissions from all over the world, and those emissions just can't be subjected to potentially conflicting regulations by every state and city affected by global warming.

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Breyer.

JUSTICE BREYER: No, you may go ahead. I pass on this.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

JUSTICE SOTOMAYOR: Counsel, this case is proof of how long a case could be extended if we permit review of every other argument than that raised initially in the complaint.

You know, the focus of the cert petition was on the federal officer question and

whether other issues could be resolved.

But the sub -- the -- the grounds for removal was 442, and that was what was at issue. So I'm not sure I agree with you that there isn't inherent delay, but let me ask you a couple of things.

Yamaha was decided in 1996. Congress amended the statute in 2011. In that period gap of 15 years, Wright and Miller had questioned the majority rule but suggested that it needed Congress to change it because it read the limitation the way that Respondents do.

So I'm not sure how you get around ratification and that it has to have some meaning, especially when we're talking an exception that could open the floodgates of litigation -- of appellate litigation in the federal system.

MR. LUCAS: Respectfully, Justice Sotomayor, I disagree with that reading of Wright and Miller. I think the treatise there from 1992 was clearly making a textual argument based on the word "order." Indeed, it anticipated this Court's decision in Yamaha, which came four years later.

But I think, with respect --

JUSTICE SOTOMAYOR: What do we do with --

MR. LUCAS: -- to ratification --

JUSTICE SOTOMAYOR: -- what do we do with the two authors who have submitted briefs saying that they think the natural reading is what the circuits have made it to be?

MR. LUCAS: You can certainly take them into account, Your Honor, but I do think that when we're looking at the weight of authority for ratification purposes, it's important to focus on quality, not just quantity.

And I do think that if you look at all the court of appeals decisions that Respondent cites in its brief, all of them are very conclusory and they're not really engaged with the text at all. To the extent there's any analysis at all in these court of appeals decisions, they're really rooted in purpose.

And I think a good example is the earliest decision that I'm aware of on this subject in the Sixth Circuit in the Appalachian Volunteers case.

And on the other side of the ledger, not only do you have Wright and Miller making the textual argument, you also have this Court's decision not only in Yamaha but also in cases in other contexts going back to the Iron Works case from 1897 construing "order" as it's plainly understood.

CHIEF JUSTICE ROBERTS: Justice Kagan.

MR. LUCAS: So we do think that the question wasn't settled in 2011.

CHIEF JUSTICE ROBERTS: Justice Kagan.

JUSTICE KAGAN: Mr. Lucas, I'd like to give you a hypothetical. Suppose that there is a removal on multiple grounds, including 1442. Then there is a remand. And then the defendant decides that he wants to appeal, but he decides that he doesn't really feel like appealing anymore the 1442 ground, he just wants to focus on the other grounds for removal. He abandons the 1442 ground.

Would the court of appeals still have jurisdiction to decide the other removal issues?

MR. LUCAS: I think, in that context, that may well be a situation for a remedy along the lines of Bell v. Hood or a dismissal or some

other form of sanctions if it's an indication that this was really a ground asserted solely to get jurisdiction.

JUSTICE KAGAN: Well, I mean, actually, it's -- it's not a frivolous argument. He just doesn't think it's as strong as other arguments. Does -- and he abandons it. Does -- is there still jurisdiction?

MR. LUCAS: I think, in that context, you could still apply a sort of Bell v. Hood-type situation and I think it would be analogous to the three-judge district court context, where this Court in recent cases, such as Shapiro, has reaffirmed that if a party seeks to get a three-judge court jurisdiction and then this Court's direct review under 1253 and the constitutional claim is an insubstantial one, then it can -- the entire case being --

JUSTICE KAGAN: I guess I --

MR. LUCAS: -- can be dismissed.

JUSTICE KAGAN: -- I guess I don't understand your argument. I mean, I can understand your hesitation in -- in answering the hypothetical the opposite way, but, once you answer me in that way, it seems as though you're

not really -- you know, "order" doesn't really mean "order" in the way that you insist that it does.

MR. LUCAS: To clarify, Justice Kagan, I think, in that context, these are simply remedies that the Court could use. We're not saying that the meaning of the word "order" changes in that context, simply that if this Court is concerned about those hypotheticals and they do arise, remedies would be available.

And I would note that this --

JUSTICE KAGAN: So there is jurisdiction, but the Court has discretionary remedies available to it?

MR. LUCAS: Yes, Your Honor.

JUSTICE KAGAN: I mean, if that's the case, I'm going to ask, like, what sense that that makes? Do you think that that's really the -- the -- the -- the statute that Congress wrote here, which is a statute that talked about 1442 but allows the Court to exercise jurisdiction in a case in which 1442 is long gone?

MR. LUCAS: I think, Your Honor, the purpose, to the extent we're trying to define

one, is that once a case is on appeal under Section 1447(d), there's no good reason for a court of appeals to artificially limit the scope of appellate review.

And going back to my colloquy with Justice Thomas, I would underscore that this isn't an unusual situation. It happens in reviews of all sorts of interlocutory orders --

JUSTICE KAGAN: Thank you, Mr. Lucas.

MR. LUCAS: -- including in Yamaha.

CHIEF JUSTICE ROBERTS: Justice Gorsuch.

JUSTICE GORSUCH: I'll pass. Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE KAVANAUGH: Thank you, Chief Justice.

And good morning, Mr. Lucas. I think this is a close call in this case. You have the text that you assert, your reading of the text in -- in Yamaha obviously helps you, but there are also problems.

One is the inequity between defendants, one of whom tacks on 1442 and

therefore gets appellate review, the other of whom doesn't have the ability to tack on 1442 and doesn't get appellate review even though they have the same other attempted federal question ground.

So that -- that's one problem, which makes it seem -- seem doubtful that Congress really intended this. There's also the gamesmanship problem. And then there's the ratification, which I want to zero in on with you.

What exactly would you say about the ratification doctrine? Because, if you just read the Black Letter description of the ratification doctrine and lay it down here, it would seem to apply. So what -- why doesn't it apply?

MR. LUCAS: First off, Justice Kavanaugh, we don't -- we don't think that "order remanding a case" is -- can really be susceptible to any ambiguity here, but even if you think that it is ambiguous and you want to rely on the ratification doctrine, I would just underscore that the circuit cases you have here really don't engage with any sort of text.

And to the extent there's any reasoning at all rather than just citations to other circuit court cases, they're really just about purpose, and even at that, it's quite conclusory.

And on the other side, I would note that you do have this Court's cases in other contexts but certainly similar ones, as well as the leading treatise anticipating this Court's decision in Yamaha based on the text of the statute. And so --

JUSTICE KAVANAUGH: So you -- you think a --

MR. LUCAS: -- in that context --

JUSTICE KAVANAUGH: -- I'm sorry, you think a prerequisite to applying that doctrine is a conclusion of ambiguity? I don't think all the -- all of our cases have said that, but that's your view of how the doctrine should apply?

MR. LUCAS: I -- I think so, Your Honor, and that's at least how I understand cases such as Milner versus Department of Navy and the like. But even if you disagree with me, Justice Kavanaugh, I still think, in this

context, it's hard to say that Congress thought this question was settled in 2011, which I think everybody agrees is the sort of touchstone of the ratification analysis, when you have on the one side, yes, a number of circuit cases, but they're poorly reasoned ones, and on the other side, you do have this Court's precedents in other areas and the leading treatise.

So I think, in that context, it's just hard to say that Congress would look at this landscape and say that, yes, this issue is firmly and conclusively settled.

CHIEF JUSTICE ROBERTS: Justice --

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: -- Justice Barrett.

JUSTICE BARRETT: Counsel, I want to go back to Justice Kagan's question because I had the same one, the one about multiple grounds for removal, there's a remand order, you decide to appeal it, but you decide not to include the 1442 or 1443 ground in the appeal.

And when Justice Kagan asked you if there would be jurisdiction, you kind of hedged a little bit and said maybe that was a -- an

instance in which Bell v. Hood could be used or sanctions could be used. But I don't see why so long as the 1442 or 1443 ground wasn't insubstantial or frivolous. So could you say a little bit more about that?

MR. LUCAS: So, if -- if no such remedy applies and you -- in terms of a sanction here, that it's not, you know, susceptible to a Bell v. Hood-type construction or to a sanction available, then I think the text of the statute would control, but I do think that's going to be rare when you get a context like that because I think, in those cases, it's quite likely that those can be fairly characterized as evidence of bad faith.

If a party seeks to gain appellate jurisdiction using one of these grounds and then abandons that argument on appeal, that would seem to me to be a pretty good candidate for an instance of a Bell v. Hood-type remedy or any number of sanctions available in this --

JUSTICE BARRETT: Well, I'm not sure about that, because if it wasn't -- if it was a decent argument, but they just decided not to press it on appeal, I'm not sure that's a

candidate for sanction or Bell v. Hood even if, as Justice Gorsuch was pointing out, we wanted to continue the life of Bell v. Hood any further.

But I don't have any other questions. Thanks, counsel.

CHIEF JUSTICE ROBERTS: Mr. Lucas, a minute to wrap up.

MR. LUCAS: Thank you, Mr. Chief Justice. A few quick points.

On gamesmanship, I just want to underscore that Respondent has neither identified any evidence of abuse in the circuits that review the entire remand order, nor really offered any compelling reason to expect that situation to change.

And if problems ever do arise in the limited set of cases where a defendant can plausibly invoke Section 1447(d)'s exception, at the end of the day, they can always be addressed by Congress.

In the meantime, the theoretical possibility of undesirable consequences is no reason to carve up undeniably appealable remand orders into reviewable and unreviewable

portions.

Rather, appellate courts should be able to figure out whether a remand order resulted from a legal error, even if that error doesn't involve federal officers or civil rights. That's how this Court has approached other types of orders, and there's no good reason for treating remand orders any differently.

Once Congress has authorized an appeal under Section 1447(d), it doesn't serve anyone for appellate courts to artificially limit the scope of their review.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Sher.

ORAL ARGUMENT OF VICTOR M. SHER

ON BEHALF OF THE RESPONDENT

MR. SHER: Thank you, Mr. Chief Justice, and may it please the Court:

According to Petitioners, merely referring to Section 1442 in a removal notice guarantees a defendant an appeal as of right of every ground rejected by the district court,

even if the 1442 ground is meritless and even if the defendant drops it on appeal.

That is not a permissible reading of 1447(d). That section, a general prohibition subject to a narrow exception, tethers appellate review to two designated grounds, 1442 and 43, and to those grounds only.

This Court has never held that review of an order necessarily encompasses every issue addressed in an order. Its interpretation of similarly worded statutes proves this. Moreover, the exception clause limits review to removals pursuant to 1442 or 43, meaning where the removal was in compliance with or in accordance with those statutes.

The court of appeals must decide if federal officer jurisdiction exists, not merely whether a defendant asserted it perhaps as a bootstrap to obtain review of grounds otherwise absolutely barred.

This case was not removed pursuant to 1442 because, as the courts below held, Petitioners do not qualify for federal officer removal. Petitioners' interpretation thus runs counter to the language and structure of

1447(d), and even if the language were not clear, their view violates basic principles of statutory interpretation.

Finally, Petitioners' construction ignores that in 2011 Congress ratified 50 years of unanimous circuit court authority that limited review of remand orders to the exception clause's enumerated grounds and only to those grounds. And the courts in those cases held that the language was clear, and that was what supported their jurisdictional analysis.

I welcome your questions.

CHIEF JUSTICE ROBERTS: Counsel, you just said that your -- the Petitioners' reading of 1447(d) is contrary to the language of the statute.

I will give you an uninterrupted three minutes to explain to me how the language "an order remanding a case shall be reviewable by appeal or otherwise" should be read to say a portion of an order remanding a case shall be reviewable by appeal or otherwise, solely with respect to the text of that.

I know you have arguments outside the text, but, with respect to the actual text,

what's -- what's -- what's your best argument?

MR. SHER: Sure, Your Honor. The first thing we have to keep in mind is that you have to look at the sentence as a whole, including the first clause, which is a general and absolute bar on appellate review of remand orders.

So then, when we look at the second clause, we have to look at the words not in isolation but as in -- in relation to their neighbors. And, there, we see that an order is reviewable but only if it is an order that -- in which the removal was pursuant to Section 1442 or 1443.

Petitioners assert that "pursuant to" is merely a label in the removal notice. But we know that can't be right because, for example, in an earlier section, in 1446, which is actually the procedure for removal of civil actions, the removing party has to -- the attorney has to file pursuant to Rule 11.

And Rule 11 has both a procedural signature component and substantive, that is, that the grounds have to be done not for delay and with substantial basis in the evidence, et

cetera.

Now the key point is that the issue isn't whether the order is reviewable but what the scope of that review is. And both the structure of the sentence, that is, the tethering to 1442 and 1443, and this Court's treatment of similar language in other statutes, like 1257, the Criminal Appeals Act, and Section 1291, review -- review of single orders is limited to certain issues within those orders, even though the language of the statute itself doesn't distinguish among those issues.

So, for all those reasons, the use of the word "order" and the use of the word "reviewable" have never meant to this Court that that necessarily means a reviewing court has to address every single issue raised within an order.

To the contrary, this Court has -- has frequently disentangled issues and made clear in cases like Swint and Abney and Behrens, all of which Petitioners ignore, that you cannot use an -- an appealable issue as a ticket for multi-issue appeals that are not allowed.

CHIEF JUSTICE ROBERTS: Thank you,

counsel.

Justice Thomas.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

Counsel, I -- I don't want to belabor the point, but I think it's an important point. Could you give us -- you mentioned some cases that support your point. Could you give us further details about those cases and why they support your point?

MR. SHER: Sure, Your Honor. And let me -- let me point to one other structural thing in Section 1447 itself that supports this analysis. Section 1447(c) says that an order remanding the case may require payment of just costs and expenses incurred as a result of the removal. So it requires the award of fees to be part of the order.

The circuits that have looked at this -- and it's 12 of them; only the Federal Circuit has not -- have held that the award of fees is reviewable even if the rest of the order falls within the bar of the general non-reviewability clause.

As to your -- as to your specific

question about cases, in Swint, a case involving Section 1983 claims, there was a single order denying motions for summary -- summary judgment. This Court said that the portion of the order denying qualified immunity was reviewable but the -- not an order whether specific defendants were policymakers. That portion of the order was not reviewable.

In Abney, there was a single order, and it was okay for the appellate court to -- to review the order denying the motion to dismiss with respect to double jeopardy but not with respect to the same order denying a challenge to the sufficiency of an indictment.

And, in Behrens, a wrongful discharge -- discharge case, Justice Scalia explained that a single order could be reviewed with respect to the issue of denying qualified immunity but not with respect to determinations of evidentiary sufficiency.

And in our brief, we discuss the cases under the Criminal Appeals Act and as well as under Section 1257. You cannot allow a party that has a non-meritorious issue, as defendants -- sorry, as Petitioners have here, to use that

issue as a hook to open up issues that this Court and the statute have plainly barred.

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Breyer.

JUSTICE BREYER: Good morning. I -- I -- I see the linguistic argument, which is tough for you, but I see the argument from -- that's order, and the argument from Yamaha, you have to overcome those. I'm not focusing on those.

I want to focus on a problem that occurred to me. It's in every legal system. It's important to have an appeal. It's -- it's unfair not to give people appeals. But, if you give them appeals in the middle of the case, too often you will really muck up the system, take too long. And so we allow some things to go ahead even though there was no appeal and it might be unfair and wrong because we don't want to muck up the system. That's what I see underlying this statute since 1887. You know?

No, no appeal. But now they have an appeal on some things. So you're not going to waste a lot of time; it's in the court of appeals anyway. You'll waste some time if you

let them have other things. But the big waste, the big time-consuming thing, is getting the appeal in the first place.

Now it's here. So we've undercut the main reason for not giving people an appeal. We've undercut it, not destroyed it.

Now, if that's correct policy, then that's on the other side that you're trying to argue. So I want you to see what you think.

MR. SHER: I don't -- I don't think it is, Your Honor. These grounds for appeal, as this Court explained in the Ruiz case talking about why that provision was jurisdictional and limited to a single issue, diversity jurisdiction is a good example, Your Honor.

You don't obtain diversity jurisdiction by having a colorable argument that there's diversity jurisdiction. You either have it or you do not. The same is true for federal officer jurisdiction. It either exists or it does not. And if it does not, then the plain language of the -- we think the plain language of the statute limits and tethers the appellate court's scope of review and that's the end of the issue.

The notion that there's a -- an efficiency that requires a court -- is based on two assumptions, both of which are wrong, by the Petitioners. The first is that there's a link somehow between asserted grounds for removal. But the fact that a party has asserted federal officer jurisdiction, which it does not have and which, in -- in this Court, it doesn't challenge, does not mean that it's entitled to bankruptcy jurisdiction or admiralty jurisdiction or federal enclave jurisdiction or any of the other jurisdictional assertions that have been made by the Petitioners in this case. There's no link. There's no reason to open up the other issues.

And, second, just as a matter of statutory construction, you don't have to read the second clause narrowly to understand that it -- that it confines the broad language of the first language. How does it confine it? Well, it restricts it to Sections 1442 and 1443.

And 50 years --

JUSTICE BREYER: Oh. Well, the argument on policy is, look, the case is here anyway, big deal, let's decide the issues. They

take a little --

MR. SHER: No, Your Honor.

JUSTICE BREYER: -- but not a lot of time. That's the mouse. And the elephant is no longer there. The elephant is it takes a lot of time to appeal, so let's not give him any.

MR. SHER: Your Honor, and this -- this case is a good example of the reason that we should be concerned about this. We've been three years in limbo between the federal and state courts.

And the -- the record below, the -- if you look at -- the only thing Your Honors have in -- from the record is the notice of removal, but there were 43 exhibits comprising 1100 -- more than 1100 pages that were part of that.

And to foist on the courts of appeals records of that extent and issues, it does not take a lot of extrapolation to understand how that would burden the courts of appeals.

JUSTICE BREYER: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

JUSTICE SOTOMAYOR: Counsel, would you address the ratification points the SG spoke

about, the counters that he mentioned, to why ratification --

MR. SHER: Well, I --

JUSTICE SOTOMAYOR: -- doesn't assist you in this case?

MR. SHER: Yes, Your Honor. Thank you. Two -- two points.

The first is that it's factually incorrect that the nine circuits that addressed this issue prior to 2011 contain no analysis. They all found the language clear, the -- the -- the commonsense reading of the statute clear, and many of them pointed that -- that out in particular.

But, with respect to the body of case law, Petitioners and the United States ignore, and I think it's significant, a couple of important cases from this Court. The first is Helsinn from 2019, a unanimous opinion in which the Court was confronted with a line of cases from the Federal Circuit involving interpretation of patent law, and the -- the -- the Federal Circuit, of course, had -- was the only one with jurisdiction over these issues.

The Court relied on that land -- that

line of cases out of the Federal Circuit and the fact that Congress reenacted not just the same language but added only a new catch-all phrase. And as the Court and the United States' amicus in that case said, that would be an -- an -- a very oblique way of attempting to overturn the settled body of law.

The settled body of law comes from what a practitioner looking at nine unanimous circuits over 50 years would think at the time, and that is that where there is a federal officer or civil rights assertion and other issues, the only issue that the court of appeals has jurisdiction to review are those issues, and that's what Congress ratified by reenacting the language and only adding "1442 or."

There was also -- and -- and -- and we cite to the House report, which -- which points out that the reason for this addition was specifically to protect federal officers from removal, as civil rights cases do because, otherwise, there is no way to get the issue into the court of appeals.

So Congress put its thumb on the scales for two issues, federal officer and --

and civil rights, because there were important public policy reasons to protect those kinds of defendants against district court error.

In all other cases, Congress has made clear and the courts have consistently held, as has this Court, that the -- if it's a -- if it's a subject matter jurisdiction issue or another ground barred by 1447(c), there is no right to appellate review. And it's jurisdictional, not just -- as Justice Scalia said, it's not just hortatory.

JUSTICE SOTOMAYOR: Thank you, counsel.

CHIEF JUSTICE ROBERTS: Justice Kagan.

JUSTICE KAGAN: Mr. Sher, on your gamesmanship point, why isn't a -- a Bell v. Hood rule or even the possibility of sanctions sufficient to remove that as a concern?

MR. SHER: Because the burden comes from -- from that large gray area between frivolity and meritless, ultimately meritless. And that's where, as the Tenth Circuit put it, no competent lawyer would -- would -- if the rule changes this way, every competent lawyer will look for a way to assert federal officer

simply so that other grounds can be -- can -- can be brought up on appeal.

And, again, the statistics from the Seventh Circuit are actually ambiguous because, as the local government associations' amici point out, while, in Lu Junhong, the Seventh Circuit said that following our opinion it would be frivolous to assert federal officer removal as a basis for removal in future cases, in fact, there have been future cases in other -- albeit in other circuits, raising exactly the same issue.

JUSTICE KAGAN: Would --

MR. SHER: So I -- I -- yes?

JUSTICE KAGAN: I'm sorry, go ahead.

MR. SHER: Sorry.

JUSTICE KAGAN: I mean, you said --

MR. SHER: Well, I was just going to --

JUSTICE KAGAN: -- you said every competent lawyer, Mr. Sher, but -- but 1442 and 1443 are pretty specific grounds for removal. It's not like everybody's going to have a plausible 1442 ground, is it?

MR. SHER: Well, Your Honor, the

assertion of federal officer jurisdiction in this case, which was rejected by now four circuits, including the Fourth Circuit below, was really based on doctrines that have been soundly disapproved and rejected by this Court, ranging from government regulation and supervision to a -- a lack of connection between the conduct that's the basis of the tort, which is misrepresentation and a campaign of deception and denial, and any relationship to the government, much less any appropriate federal interest in promoting those kinds of lies and deceit.

But we see them asserted continually. And -- and, again, as the same amicus as well as the New York State amici point out, that removal has become a tactic of defendants in a wide range of cases, including environmental regulation, opioids, sub-prime lending in financial institutions and others. And in every one of those instances, there -- these involve national industries heavily regulated by the federal government and you -- you could have colorable assertions.

And -- and -- and a rule that broadly

opened the gates to other issues and appellate rights would not only result in longer delays but would burden the -- the records of the courts.

There's a -- these are not just -- not just our cases, Your Honor, but big cases involving large companies and important interests frequently bump up against federal interests, and the issue here is whether there's a federal officer connection, which there is not.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch.

JUSTICE GORSUCH: Good morning, counsel.

MR. SHER: Good morning, Your Honor.

JUSTICE GORSUCH: I'd like to return to the text where the Chief started us, and it seems to me that everyone would agree that the first clause of 1447's reference to "an order remanding a case to the state court from which it's removed" is not reviewable.

That first portion, everybody agreed that's the whole order. It's not like a court

can review some of it. And, normally, we -- the question is what happens to the term "order" as it appears in the second clause.

And, normally, we -- we read a statute that uses a single term to employ the same definition throughout. The government charges that that's one defect in your statutory interpretation. I didn't hear you address that concern with -- in your discussion with the Chief, and I was hoping you might now.

MR. SHER: Yes. Thank you, Justice Gorsuch. So two points. First of all, the first clause of subsection (d) has to relate to -- to subsection (c), which includes "an order remanding the case may require payment of just costs and any actual expenses incurred as a result of the removal."

And every circuit, 12 circuits have looked at that, and they have all concluded that regardless of whether the ground for the removal is -- is reviewable under the first clause of subsection (d), they can address that issue. And under Petitioners' view, they could not, unless it was a case involving 1442 or 1443. So that's -- that -- that's the first point.

The second point is --

JUSTICE GORSUCH: Let's put aside 1447(c). There's a whole list of arguments we could go down that rabbit hole. I'm --

MR. SHER: Okay.

JUSTICE GORSUCH: -- I'm really just focused on (d) at the moment.

MR. SHER: Okay. So (d) is an exception clause and -- and has to be led in right -- sorry, has to be read in light of the first clause, which is a general bar. And it says "removed pursuant to Section 142" -- "1442 or 1443."

Now that cannot be procedural because 1442 and 1443 are exclusively substantive. They set forth standards for 14 -- for federal officer and civil rights qualifications for removal, respectively.

So "pursuant to Section 1442 or 1443" must mean something other than simply that the notice of removal referenced them, and this is why that language acts both as a tether as a matter of -- of -- of commonsense interpretation of the statute, focusing the court of appeals' attention on those issues and those issues

alone, and as a substantive bar because "pursuant to," as this Court has interpreted it in other contexts and as the Constitution uses the -- the phrase "in pursuance to" for legislation, means not just procedural compliance but substantive compliance.

JUSTICE GORSUCH: And what do you do about Yamaha? I understand that the question there was when, and it's which order is the question here, what part of it. So the questions are different, I get that, but I'm not sure I understand why the different -- that difference makes -- makes a difference given the scope of our reasoning in Yamaha.

Do you want to address that for me?

MR. SHER: It -- yes, thank you, Your Honor. It -- it is because the key point in both Yamaha and here is not the use of the term "order" but answering the question, what is the scope of review on appeal?

And in Yamaha, looking at the language of -- of what the district court can certify as involving a controlling question of law and looking at the appellate court's discretion to either accept the -- the appeal, the

interlocutory appeal, at all or move on to other issues within the scope of the order, it means that's the -- the Court said the scope of review under those conditions in that context made sense. But, here --

CHIEF JUSTICE ROBERTS: Justice Kavanaugh -- oh, I'm sorry. Finish your answer, please.

MR. SHER: Oh, thank you, Your Honor. I'll be brief.

The --- in -- in -- in 1447(d), which is a jurisdictional statute, the -- the -- the language is limiting, not discretionary. It's mandatory, and -- and it can only -- it should only be read, we submit, to focus attention on the 1442 or 43 grounds.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE KAVANAUGH: Thank you, Chief Justice.

Good afternoon, Mr. Sher.

MR. SHER: Good afternoon.

JUSTICE KAVANAUGH: Let's start -- let's start with an atmospheric question. I know the Maryland state court system is very

strong and has an excellent reputation. I know the Maryland federal judiciary, similarly, is filled with excellent judges.

I asked Mr. Shanmugam why he wanted to be in federal court. He gave me a legal answer. He didn't really go beyond that.

You really want to be in state court. Why?

MR. SHER: We don't believe federal court jurisdiction exists and the cases -- there is no federal claim to assert here, Your Honor. The -- the tort that is concerned -- that is -- that we're concerned with -- and the Fourth Circuit addressed this in detail in its opinion, as did Judge Hollander in the district court; it's on pages 21a and 22a of the -- of the circuit court's opinion in the -- in the record -- pointed out that the -- that the conduct complained of is fraud, deception, denial, and disinformation --

JUSTICE KAVANAUGH: Okay. I -- I --

MR. SHER: -- and that those are traditional state foci and traditional state remedies --

JUSTICE KAVANAUGH: I get that.

MR. SHER: -- for which, frankly, at this point, there is no federal analog.

JUSTICE KAVANAUGH: Right. Okay. So that's -- that's your legal answer. That's fine.

Moving on to a different question, as Justice Gorsuch said, I think, the text in isolation is a problem for you, and that means the text is a problem for you.

You also, I think, have a problem with Yamaha. And, you know, it's never good to be on the wrong side of a Justice Ginsburg opinion, but particularly on a jurisdictional issue, and what she wrote for the Court there is, "As the text of Section 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."

And that language, as you know well, is -- is similar. What do we do with Yamaha? Justice Gorsuch was touching on this as well, but that sentence in particular seems problematic.

MR. SHER: Well, I think you start

with this Court's interpretations of Section 1291 in which the Court has said that, despite virtually identical language about what is appealable from the district courts, that -- that only certain issues within an order are appealable and -- or reviewable and others are not, and -- and the other two statutes that -- that we discuss at length in our brief.

And Yamaha's reference to "order" was in the context of a particular statute, who -- setting aside congressional intent and purpose, which I'm not -- which I think also cut in our favor here, but simply looking at the language of Section 1292(b), it is not similar in its commonsense reading to the commonsense reading of 1447(d).

JUSTICE KAVANAUGH: Okay. One last question --

MR. SHER: Again --

JUSTICE KAVANAUGH: -- Mr. Sher --

MR. SHER: Sure.

JUSTICE KAVANAUGH: -- which is on the reenactment canon, which Justice Sotomayor and I have been asking about.

MR. SHER: Sure.

JUSTICE KAVANAUGH: Just looking at our cases, it looks like it's often used, to borrow a phrase in a different context from Justice Kagan, like icing on a cake already frosted when we use the doctrine. You cited Helsinn, and that was -- that's a good case for you to cite, I -- I agree, but that -- that was relying mostly on the fact that our precedent -- we were sticking with our precedent.

And it did mention the reenactment. But Professor Eskridge, in his treatises, has pointed out that the presumed intent justification behind that doctrine is, in his words, "unusually weak." And I just wonder how much work it can do here given that it -- it's really not clear, we don't have any indication, that Congress actually -- or members actually focused on this and intended in any way to ratify the interpretation.

Can you respond to that?

MR. SHER: Yes, Your Honor. First of all, in Helsinn, the point was there was not controlling authority from this case -- I'm sorry, from this Court, but, rather, there was from a circuit court, the federal court -- the

Federal Circuit.

And, second, in his treatise, Scalia and -- shoot, I'm going to -- I'm -- I'm -- I'm spacing whether it's Garner or Warner, but what they --

JUSTICE KAVANAUGH: It's Garner.

MR. SHER: Garner, thank you. The -- the -- the issue is whether a practitioner at the time would view the -- the issue as settled. And, here, a practitioner in 2011 would look at the unanimous 50 years of precedent from nine circuits that had all held that if the issue goes up to a court of appeals and it's among several, that only the 1442 or 43 -- actually, to that point, it was only 1443 ground could be reviewed --

CHIEF JUSTICE ROBERTS: Justice Barrett.

MR. SHER: -- and would conclude --

JUSTICE BARRETT: Counsel, I want to walk you through a procedural question that I have about your interpretation. So I want to talk about your "pursuant to" argument, in which you say that a case hasn't been removed pursuant to 1442 or 1443 unless it has been correctly

removed pursuant to those cases.

So, in other words, in this case, because the officer removal ground was flawed, we couldn't say that this case had been removed pursuant to the officer removal ground.

Has any court of appeals ever adopted that argument?

MR. SHER: For 1442 and 43? As -- as it turns out, the answer is --

JUSTICE BARRETT: For your reading of 14 -- I'm -- I'm sorry, your reading of 1447(d), which you say that "pursuant to" -- you -- you -- you lean on "pursuant to" as one of the reasons to construe the statute your way.

MR. SHER: Correct. And the answer is yes. In fact, it was the Fourth Circuit in a 1969 opinion called House v. Dorsey, 408 F.2d 1008, it was a 1443 removal solely. The court of appeals looked at it and held that the removing party did not qualify under 1443 and dismissed for lack of jurisdiction.

JUSTICE BARRETT: Well, the court didn't do that here, right? Because, I mean, if you're right, it seems like on appeal, if the Fourth Circuit in this case concluded as it did

that the remand order was proper, that it had not been properly removed under the federal officer removal statute, they should have dismissed for lack of jurisdiction, not affirm the remand order, correct?

MR. SHER: Yeah, correct, Your Honor. The -- the general practice, though, in fact, the universal practice in the courts that have applied a commonsense language interpretation to the statute, has been to dismiss the other grounds asserted for lack of jurisdiction and then either affirm or reverse on --

JUSTICE BARRETT: But that's inconsistent -- that's --

MR. SHER: -- on the merits of this particular case.

JUSTICE BARRETT: But, counsel, that's inconsistent with your reading of the statute because, if the Court doesn't have jurisdiction unless the case has been properly removed pursuant to, say, the federal officer removal statute, there's no jurisdiction. It can't affirm. It would have to dismiss even on that ground. So if courts were implicitly --

MR. SHER: Not quite, Your Honor.

JUSTICE BARRETT: -- seeing it your way, they wouldn't procedurally be disposing of these cases this way.

MR. SHER: So -- so there -- there are two -- two things. One is we offer two different ways of reaching the same result. One is under a commonsense language reading of the statute in which the words "pursuant to" qualify the exception and tether the -- the appellate court's review to those issues, but it's not necessarily -- as Your Honor points out, it's not necessarily a jurisdictional analysis. It just means that the appeal has to be limited and focused on those grounds.

The other reading is the jurisdictional analysis, which we think flows from the use of terms that this Court has consistently held have substantive jurisdictional meaning, for instance, in Helmerich and in Ruiz, but --

JUSTICE BARRETT: So, counsel, I just want to ask a clarifying question. When you say the jurisdictional analysis, is that the analysis that I just asked you about? Is that what you're calling a jurisdictional analysis of

"pursuant to"?

MR. SHER: Yes, Your Honor, "pursuant to" -- "pursuant to" establishes a jurisdictional threshold and that a -- a -- a -- a case must substantively comply with the requirements of 1442 in order for the case to have been removed pursuant to that provision. And that is --

JUSTICE BARRETT: Well, counsel --

MR. SHER: -- a jurisdictional --

JUSTICE BARRETT: -- let me turn you back to your other "pursuant to" argument, which, as I understand it, kind of implicitly means pursuant exclusively to.

Does that make sense? Because then someone who had a basis for removing under, say, the civil rights removal statute would be discouraged from including any other grounds.

MR. SHER: No, Your Honor. The -- the --

JUSTICE BARRETT: Unless, of course, they appeal.

MR. SHER: No, Your Honor. The -- the -- the -- the point is that on appeal, having been remanded, the error that can be

corrected by the court of appeals is limited to the specified ground. And that's what the commonsense reading is. Nothing is allowed except it is allowed to look at orders remanding pursuant to specific provisions. And that's -- that's --

CHIEF JUSTICE ROBERTS: A minute to wrap up, Mr. Sher.

MR. SHER: Yes. Thank you, Your Honor.

The best commonsense reading, following up on this colloquy, of the exception clause is that it creates a limited exception to 1447(d)'s general bar on appellate review for federal officer and civil rights grounds and only for those grounds.

Petitioners' reading would create an exception that swallows that rule, an exception that would apply to one group and one group alone, defendants who make meritless claims to removal on either of them. The text does not compel this reading, and it is implausible to think that is what Congress intended.

The interpretation also runs contrary to the principles and purposes that animate

Section 1447(d). Consistent with nearly unanimous view of the lower courts, including the four circuit courts to decide this issue in the last year, and consistent with the view ratified by Congress in 2011, this Court should affirm.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Shanmugam, rebuttal?

REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM
ON BEHALF OF THE PETITIONERS

MR. SHANMUGAM: Thank you, Mr. Chief Justice.

There is one fundamental problem with Respondents' argument today. It finds no home in the actual language of Section 1447(d).

There's simply no way as a matter of ordinary English to construe "order" to mean merely a portion of an order. In Yamaha, Justice Ginsburg, writing for a unanimous court, relied on that plain meaning to reach the same conclusion.

And Respondents' interpretation would have the added consequence of giving the phrase "order remanding a case" different meanings in

different clauses of the very same statutory sentence.

Respondents' only colorable textual argument here is its ratification argument, but, Justice Kavanaugh, this is anything but a classic case for ratification, especially in the absence of any relevant legislative history.

As Justice Scalia explained in his opinion for the Court in Alexander versus Sandoval, the relevant inquiry is whether one can "assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the court's statutory interpretation."

Here, there is simply no reason to believe that Congress was preferring the unreasoned decisions of some courts of appeals construing this statute over the reasoned decisions of this Court construing materially identical ones, particularly given the technical nature of the 2011 amendment.

Congress could well have concluded that it wanted plenary review in these cases and that the value of correcting erroneous remands in these specific contexts outweigh the cost of

any incremental delay.

Justice Thomas, you expressed concern that this could lead to the smuggling in of additional issues on appeal.

Of course, under Section 1291, plenary review is the default, not the exception, in our appellate system, but there's no reason to believe that there are going to be a lot of these cases.

As the DRI amicus brief notes, in the five years since the Seventh Circuit adopted our interpretation, there have only been six notices of removal citing either of these statutes and only three appeals in those cases.

And, again, sanctions and fees are available to deter any abuse. Indeed, the very provisions at issue here specifically state that notices of removal are subject to the requirements of Rule 11.

And, finally, delay is not a significant concern here. Justice Sotomayor, the reason there has been delay in this case has not been because of the other grounds for removal, which, because of its erroneously narrow view of its own jurisdiction, the court

of appeals after all did not reach.

Our rule would enable courts of appeals to resolve these appeals more efficiently where a court concludes that there is an easier ground for removal than the often fact-intensive federal officer ground, and there would be delay only in a case in which a federal court stays the state court proceedings on remand, which would occur only when the court determined that a defendant is likely to succeed on its appeal.

There's, therefore, no good policy reason to override the plain text of Section 1447(d), and because there is plainly federal jurisdiction over these claims, this Court should therefore reverse the court of appeals' judgment.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 12:39 p.m., the case was submitted.)

Y

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