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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY; BOARD OF COUNTY COMMISSIONERS OF SAN MIGUEL COUNTY; CITY OF BOULDER,

Plaintiffs-Appellees,

v.

SUNCOR ENERGY (U.S.A.) INC.; SUNCOR ENERGY SALES INC.; SUNCOR ENERGY INC.; EXXON MOBIL CORPORATION,

Defendants-Appellants.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; PUBLIC CITIZEN, INC.; THE NATIONAL LEAGUE OF CITIES; THE U.S. CONFERENCE OF MAYORS; THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION; COLORADO COMMUNITIES FOR CLIMATE ACTION; NATURAL RESOURCES DEFENSE COUNCIL

Amici Curiae.

No. 19-1330

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:18-CV-01672-WJM-SKC)

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Richard Herz, EarthRights International, Washington, D.C. (Marco Simons, Sean Powers, Michelle Harrison, EarthRights International, Washington, D.C.; David G. Bookbinder, Niskanen Center, Washington, D.C.; and Kevin S. Hannon, The Hannon Law Firm, Denver, Colorado, with him on the brief), for Plaintiff – Appellee.

Peter D. Keisler, C. Frederick Beckner III, and Ryan C. Morris, Sidley Austin LLP, Washington, D.C., filed an amicus brief on behalf of Chamber of Commerce of the United States of America.

W. Eric Pilsk, Sarah M. Keane, Sara V. Mogharabi, and Samantha R. Caravello, Kaplan Kirsch & Rockwell LLP, Denver, Colorado, filed an amicus brief on behalf of Colorado Communities for Climate Action.

Robert S. Peck, Center for Constitutional Litigation, P.C., Washington, D.C., filed an amicus brief on behalf of the National League of Cities, the United States Conference of Mayors, and the International Municipal Lawyers Association.

Peter Huffman, Natural Resources Defense Council, Washington, D.C., filed an amicus brief on behalf of the Natural Resources Defense Council.

Scott L. Nelson and Allison M. Zieve, Public Citizen Litigation Group, Washington, D.C., filed an amicus brief on behalf of Public Citizen.

Before **LUCERO**, **HOLMES**, and **McHUGH**, Circuit Judges.

McHUGH, Circuit Judge.

This appeal concerns whether federal court is the proper forum for a suit filed in Colorado state court by local governmental entities for the global warming-related damage allegedly caused by oil and gas companies in Colorado. Suncor Energy and ExxonMobil advanced seven bases for federal subject matter jurisdiction in removing the action to federal court, each of which the district court rejected in its remand order. Suncor Energy and ExxonMobil now appeal, relying on six of those bases for federal jurisdiction. We hold, however, that 28 U.S.C. § 1447(d) limits our appellate jurisdiction to just one of them—federal officer removal under 28 U.S.C. § 1442(a)(1). And because we conclude ExxonMobil failed to establish grounds for federal officer removal, we affirm the district court's order on that basis and dismiss the remainder of this appeal.

I. BACKGROUND

Three local Colorado government entities—the County Commissioners of Boulder and San Miguel Counties and the City of Boulder (Plaintiffs-Appellees; collectively, the "Counties")—filed suit in Colorado state court on June 11, 2018, against Suncor Energy[1] and ExxonMobil Corporation (Defendants-Appellants, collectively, "Defendants"). The complaint asserts that the Counties face substantial and rising costs to protect people and property within their jurisdictions from the threat of global warming, including from increasing and intensified heat waves, wildfires, droughts, and floods across Colorado. The Counties allege that Defendants

[1] "Suncor Energy" includes Suncor Energy (U.S.A.) Inc.; Suncor Energy Sales Inc.; and Suncor Energy Inc.

have substantially contributed to this local environmental harm by engaging in unchecked fossil fuel activity—producing, promoting, refining, marketing, and selling—which has resulted in excess greenhouse gas emissions. For decades after becoming aware of the dangers of global warming, the Counties further allege, Defendants continued to produce, promote, refine, market, and sell fossil fuels at levels that caused and contributed to negative climate alteration without disclosing the harms posed by continued fossil fuel overuse. According to the complaint, Defendants misrepresented the dangers of unchecked fossil fuel use and acted to prevent and forestall changes in energy use that they knew were needed to limit the impact of global warming, thereby exacerbating the climate-related harm suffered by the Counties and their residents.

The complaint asserts state law claims for public and private nuisance, trespass, unjust enrichment, civil conspiracy, and violation of the Colorado Consumer Protection Act. Among other forms of relief, the Counties seek past and future compensatory damages to mitigate the impact of global warming in their respective jurisdictions, along with remediation and/or abatement of the attendant global warming-related environmental hazards they now face. The Counties do not seek "to enjoin any oil and gas operations or sales in the State of Colorado, or elsewhere, or to enforce emissions controls of any kind." App. 195. They ask the state court not "to stop or regulate" fossil fuel production or emissions, but instead to ensure Defendants pay a pro rata share of the costs the Counties have incurred and will incur based on Defendants' averred contribution to climate alteration, and to help remediate the

harm the Counties claim has been and will be caused by Defendants' allegedly tortious and illegal conduct. App. 74.

On June 29, 2018, Defendants filed a notice of removal in federal district court for the District of Colorado, asserting seven grounds for federal jurisdiction. Five of these grounds relied upon the general removal statute, 28 U.S.C. § 1441(a), which allows for removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." Of these five grounds, four were based on general federal question jurisdiction[2]—that the Counties' claims (1) arose under federal common law; (2) were completely preempted by federal law; (3) implicated disputed and substantial federal issues under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005); and (4) arose in part from incidents that occurred on federal enclaves. The fifth claim of original federal jurisdiction was based on the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b). Additionally, Defendants relied on two other removal provisions: the bankruptcy removal statute, 28 U.S.C. § 1452, and the federal officer removal statute, 28 U.S.C. § 1442(a)(1).

The Counties filed a motion to remand pursuant to 28 U.S.C. § 1447(c) based on lack of federal subject matter jurisdiction. The district court granted this motion on September 5, 2019, rejecting all seven grounds for removal and remanding to the

[2] See 28 U.S.C. § 1331, which confers original jurisdiction on the federal district courts "of all civil actions arising under the Constitution, laws, or treaties of the United States."

Colorado state court. *Bd. of Cty. Comm'rs. of Boulder County v. Suncor Energy (U.S.A.) Inc.* (*Boulder County I*), 405 F. Supp. 3d 947, 954–55 (D. Colo. 2019).

Defendants appealed the district court's remand order with respect to six of their seven asserted bases for removal (omitting a challenge to bankruptcy removal). They also moved in the district court for a stay of the remand order pending appeal. Notwithstanding the general bar to remand order appealability imposed by 28 U.S.C. § 1447(d), Defendants argued before the district court that the exception in § 1447(d) permitting review of federal officer removal under 28 U.S.C. § 1442 creates appellate jurisdiction to consider all of their asserted removal bases. While acknowledging that this court has yet to determine the scope of appellate review of remand orders premised on the § 1447(d) exceptions, as well as circuit disagreement on that issue, Defendants asserted that plenary review was compelled by a Seventh Circuit decision interpreting the Supreme Court's holding in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996). Defendants further contended that this court's interpretation of the Class Action Fairness Act's removal provision in *Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240 (10th Cir. 2009), "strongly suggests that it would review the district court's entire order, not simply the ground that permitted appeal." Defendants' Mot. for Stay of Remand Order, Dist. Ct. ECF No. 75 at 6.

The district court denied this motion to stay its remand order on October 7, 2019. *Bd. of Cty. Comm'rs of Boulder County v. Suncor Energy (U.S.A.) Inc.* (*Boulder County II*), 423 F. Supp. 3d 1066 (D. Colo. 2019). Noting the split of authority on the scope of appellate review of remand orders, as well as the lack of a

controlling Tenth Circuit opinion, the district court reasoned that this court would likely "follow the weight of authority and find that the only ground subject to appeal is federal officer jurisdiction under § 1442." *Id.* at 1070. It disagreed with Defendants' reading of *Yamaha* and *Coffey*, finding instead that "*Coffey* suggests the Tenth Circuit would be unlikely to review aspects of a remand order that would otherwise be unreviewable"—here, all bases for federal question jurisdiction other than § 1442. *Id.* at 1071.

Defendants then filed motions in this court and the Supreme Court for a temporary stay of the remand order pending appeal, which both courts denied. The Counties filed a motion for partial dismissal based on the reviewability bar in § 1447(d), seeking to narrow the issues on appeal to only the propriety of federal officer removal.[3] It is to this issue of the scope of our appellate jurisdiction that we first turn.

II. SCOPE OF APPELLATE JURISDICTION

"'The authority of appellate courts to review district-court orders remanding removed cases to state court is substantially limited by statute,' namely, 28 U.S.C. § 1447(d)." *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 459 (4th

[3] The Counties also moved for summary affirmance based on issue preclusion, arguing the Fourth Circuit's ruling in *Mayor & City Council of Baltimore v. B.P. PLC*, 952 F.3d 452 (4th Cir. 2020)—which rejected the same federal officer removal argument brought here, in a case featuring ExxonMobil as a defendant—is a supervening change of law under 10th Cir. R. 27.3(A)(1)(b). *See also County of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020) (rejecting the same federal officer removal argument in a case also featuring ExxonMobil as a defendant).

Cir. 2020) (quoting *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 229 (2007)). Consequently, "the threshold question in an appeal of a remand order is whether the district court's decision is reviewable notwithstanding the proscription set forth in 28 U.S.C. § 1447(d)."[4] *Am. Soda, LLP v. U.S. Filter Wastewater Grp.*, 428 F.3d 921, 924 (10th Cir. 2005). Section 1447(d) of the Judicial Code, Title 28 U.S.C., provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

The primary clause of this statute is construed together with 28 U.S.C. § 1447(c), which describes two grounds for remand—lack of federal subject matter jurisdiction and a defect in removal procedure. *See Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995); *City of Albuquerque v. Soto Enters.*, 864 F.3d 1089, 1092–95 (10th Cir. 2017). "If a district court orders remand on either of these grounds, § 1447(d) absolutely prohibits appellate review of the order, and we adhere firmly to this prohibition even where we believe that the district court was plainly incorrect." *Kennedy v. Lubar*, 273 F.3d 1293, 1297 (10th Cir. 2001); *see also Powerex Corp.*, 551 U.S. at 238–39 ("Appellate courts must take th[e] jurisdictional prescription [of § 1447(d)] seriously, however pressing the merits of the appeal might

[4] We can thoroughly explore this question because "federal courts always have jurisdiction to consider their own jurisdiction." *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 (10th Cir. 2005).

seem."). "Thus, we have jurisdiction to review a remand order only if (1) the remand was for a reason other than lack of subject matter jurisdiction or a defect in the removal procedure or (2) the 'except' clause of § 1447(d) gives us jurisdiction." *Miller v. Lambeth*, 443 F.3d 757, 759 (10th Cir. 2006).

The roots of § 1447(d)'s primary clause stretch back to 1887. *Thermtron Prods. v. Hermansdorfer*, 423 U.S. 336, 343 (1976); *see Osborn v. Haley*, 549 U.S. 225, 262 (2007) (Scalia, J., dissenting) (stating that § 1447(d)'s "bar to appellate review is a venerable one"). The "except" clause was added via the 1964 Civil Rights Act, and allowed for appellate review only of remands of civil rights cases removed pursuant to 28 U.S.C. § 1443. *See Thermtron*, 423 U.S. at 342 n.7. Congress expanded this clause to provide for review of remands of cases removed pursuant to the federal officer removal statute, 28 U.S.C. § 1442, through the Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545. This act amended § 1447(d) "by inserting '1442 or' before '1443.'" 125 Stat. at 546.

Here, the district court's remand order was premised on lack of subject matter jurisdiction, a § 1447(c) ground barred from review by § 1447(d). *Boulder County I*, 405 F. Supp. 3d at 955–56. This characterization was indisputably colorable. *See Powerex Corp.*, 551 U.S. at 234 ("[R]eview of the District Court's characterization of its remand as resting upon lack of subject-matter jurisdiction, to the extent it is permissible at all, should be limited to confirming that that characterization was colorable."). It was also indisputably in good faith. *See Archuleta v. Lacuesta*, 131 F.3d 1359, 1363 (10th Cir. 1997) ("[W]here a district court in good faith remands a

case for lack of jurisdiction under § 1447(c), we do not have the power to review the remand."). The jurisdictional dispute thus concerns only the effect of § 1447(d)'s "except" clause on the scope of our appellate review of the district court's order.[5]

Defendants assert that because their removal was premised partly on federal officer removal under § 1442, we have appellate jurisdiction to review the district court's entire remand order, not just the portion dispensing with the federal officer removal argument. The Counties disagree, asserting that the scope of our review must be confined to the district court's disposition of the § 1442 argument. We have yet to issue a precedential opinion deciding this question of appellate jurisdiction, which turns on statutory construction.[6] In doing so now, we adopt the narrower interpretation of the scope of § 1447(d) review advanced by the Counties.

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[5] Appellate jurisdiction is also constrained by 28 U.S.C. § 1291, which empowers federal circuit courts to review only "final decisions of the district courts." In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 352–53 (1976), the Supreme Court stated that "an order remanding a removed action does not represent a final judgment reviewable by appeal." But the Court disavowed this assertion in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), reasoning that while the abstention-based remand order at issue "d[id] not meet the traditional definition of finality," *id.* at 715, it was nonetheless appealable because it put the litigants "effectively out of [federal] court," *id.* at 714 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 n.11 (1983)). "We have acknowledged the central point of *Quackenbush*, i.e., that a remand order may be reviewed under 28 U.S.C. § 1291 as a final order or as a collateral order because [a] remand order puts the litigants effectively out of court." *In re Stone Container Corp.*, 360 F.3d 1216, 1219 (10th Cir. 2004) (internal quotation marks omitted). Consequently, § 1291 does not present a jurisdictional hurdle here.

[6] In *Sanchez v. Onuska*, No. 93-2155, 1993 WL 307897, at *1 (10th Cir. Aug. 13, 1993) (unpublished), we determined that § 1447(d) allowed for review of a remand order "[t]o the extent the removal is based upon § 1443," but that the remainder of the remand order was "not reviewable and must be dismissed for lack of

A. *The § 1447(d) Circuit Split*

Before proceeding to the substantive statutory analysis, we pause to note disagreement among the courts of appeals over whether invoking a § 1447(d) exception in a petition for removal creates appellate jurisdiction over the district court's whole remand order, or only over that portion addressing the excepted basis. Six circuits—the Second, Third, Fourth, Eighth, Ninth, and Eleventh—hold that a remand order premised on a § 1447(c) ground is reviewable only to the extent it addresses a § 1442 (federal officer) or 1443 (civil rights) removal argument. *See Jacks v. Meridian Resource Co.*, 701 F.3d 1224, 1229 (8th Cir. 2012); *Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006); *Alabama v. Conley*, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001); *Davis v. Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997); *State Farm Mut. Auto Ins. Co. v. Baasch*, 644 F.2d 94, 97 (2d Cir. 1981); *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976); *see also City of Baltimore*, 952 F.3d at 459 (rejecting arguments to depart from circuit precedent on the scope of § 1447(d) review via an appeal concerning functionally identical global warming-related state law claims); *County of San Mateo v. Chevron Corp.*, 960 F.3d 586, 595–98 (9th Cir. 2020) (same).

In 2015, the Seventh Circuit fractured this unanimity on the scope of appellate review created by § 1447(d), holding that the invocation of a § 1447(d) exception

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jurisdiction." Unpublished decisions, of course, provide only persuasive authority. *See* 10th Cir. R. 32.1(A). After conducting our own analysis here, we adopt a position consistent with *Onuska*.

allows for plenary review of all other removal bases addressed in a remand order. *See Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015).[7] Unlike the other courts to address the issue—which employed mostly summary analysis in refusing to extend the review granted by the § 1447(d) exceptions to any otherwise nonreviewable removal bases contained in a remand order—the Seventh Circuit engaged in a comprehensive discussion of statutory text and policy. As Defendants lean heavily on this reasoning, we examine it in some depth.

[7] Two other circuits have since issued opinions following *Lu Junhong* on the scope of appellate review created by § 1447(d), but each has conflicting precedent on the issue.

In *Decatur Hospital Authority v. Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017), the Fifth Circuit relied on *Lu Junhong*'s reasoning to hold the entire district court's remand order reviewable when one of the asserted grounds for removal is § 1442. In a subsequent opinion dismissing in part an appeal from a remand order, however, the Fifth Circuit noted in passing that while the defendant "d[id] not argue that the § 1447(d) exception for federal officer jurisdiction allows us to review the entire remand order," "[t]his court has rejected similar arguments in the past." *City of Walker v. Louisiana*, 877 F.3d 563, 566 n.2 (5th Cir. 2017) (citing *Robertson v. Ball*, 534 F.2d 63, 65–66 (5th Cir. 1976)); *see also Gee v. Texas*, 769 F. App'x 134, 134 & n.2 (5th Cir. 2019) (unpublished) (following *City of Walker*, while not citing *Decatur Hospital*, in holding that "[w]here a party has argued for removal on multiple grounds, we only have jurisdiction to review a district court's remand decision for compliance with [§ 1442 or 1443]").

In *Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017), the Sixth Circuit cited *Lu Junhong* in holding that its jurisdiction to review an order remanding a case that was removed pursuant to § 1442 "also encompasses review of the district court's decision on the alternative ground for removal under 28 U.S.C. § 1441"—there, "substantial federal question" jurisdiction. However, *Mays* failed to distinguish two Sixth Circuit decisions from the 1970's—*Detroit Police Lieutenants & Sergeants Ass'n v. City of Detroit*, 597 F.3d 566, 567–68 (6th Cir. 1979), and *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 534 (6th Cir. 1970)—that held appellate jurisdiction lacking to review any portion of a district court's remand order other than its ruling on § 1443 (at that time the only statutory exception in § 1447(d)).

The Seventh Circuit's reasoning in *Lu Junhong* relied primarily on the Supreme Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996). *Yamaha* addressed the meaning of 28 U.S.C. § 1292(b), which concerns a district court's certification of controlling questions of law to the courts of appeals for discretionary review. The *Yamaha* Court held that upon accepting an interlocutory appeal under § 1292(b), a federal court of appeals has jurisdiction over the whole "order," rather than being limited to review of the individual question (or questions) framed by the district court. 516 U.S. at 205. Per *Lu Junhong*'s interpretation of *Yamaha*'s holding, "[t]o say that a district court's 'order' is reviewable is to allow appellate review of the *whole* order, not just of particular issues or reasons." 792 F.3d at 811.

In determining that § 1447(d) is best construed the same way, *Lu Junhong* analogized to another statute creating an exception to the general lack of appellate jurisdiction over remand orders. The Class Action Fairness Act ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4–14, creates federal subject matter jurisdiction over certain types of class actions and allows for appellate review "of 'an order of a district court' that has remanded after finding that the Act does not permit removal." 792 F.3d at 811 (quoting 28 U.S.C. § 1453(c)(1)). A prior Seventh Circuit decision, *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 451–52 (7th Cir. 2005), applied *Yamaha* in interpreting § 1453(c)(1) to allow for plenary review of remand orders addressing CAFA removal, even if such orders also address other bases for removal. *Lu Junhong* reasoned that *Brill* stood for the proposition "that once an appeal of a

remand 'order' has been authorized by statute, the court of appeals may consider all of the legal issues entailed in the decision to remand." 792 F.3d at 811.

The *Lu Junhong* court deemed its interpretation of the word "order" in § 1447(d) to be "entirely textual":

> The Court remarked in *Kircher* [*v. Putnam Funds Trust*, 547 U.S. 633, 641 n.8 (2006)], that Congress has on occasion made the rule of § 1447(d) inapplicable to particular "orders"—and for this the Court cited, among other statutes, § 1447(d) itself. We take both Congress and *Kircher* at their word in saying that, if appellate review of an "order" has been authorized, that means review of the "order." Not particular reasons *for* an order, but the order itself.

Id. at 812.

And the *Lu Junhong* court further determined that § 1447(d)'s statutory purpose led to the same outcome:

> [Section] 1447(d) was enacted to prevent appellate delay in determining where litigation will occur. . . . But once Congress has authorized appellate review of a remand order—as it has authorized review of suits removed on the authority of § 1442—a court of appeals has been authorized to take the time necessary to determine the right forum. The marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small.

Id. at 813 (citations omitted). Any concern that unscrupulous defendants will use the § 1447(d) exceptions as "a hook to allow appeal of some different subject" did not counsel a different result, because frivolous removals can lead to sanctions, and frivolous appeals can be dealt with summarily. *Id.*

B. *Statutory Analysis*

To decide the scope of our appellate review of the district court's remand order—and determine whether to follow *Lu Junhong* or the opposing weight of circuit authority on the issue—we must construe the meaning of § 1447(d)'s "except" clause de novo. *See United States v. Porter*, 745 F.3d 1035, 1040 (10th Cir. 2014).

"The goal of statutory interpretation is to ascertain the congressional intent and give effect to the legislative will." *In re Taylor*, 899 F.3d 1126, 1129 (10th Cir. 2018) (internal quotation marks omitted). "In conducting this analysis, we first turn to the statute's plain language," *id*, as "[a] statute clear and unambiguous on its face must be interpreted according to its plain meaning," *In re Geneva Steel Co.*, 281 F.3d 1173, 1178 (10th Cir. 2002).

"A statute is ambiguous when it is capable of being understood by reasonably well-informed persons in two or more different senses." *United States v. Quarrell*, 310 F.3d 664, 669 (10th Cir. 2002) (internal quotation marks omitted). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Ceco Concrete Const., LLC v. Centennial State Carpenters Pension Tr.*, 821 F.3d 1250, 1258 (10th Cir. 2016) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). If statutory meaning cannot be derived "merely by reference to the text, we may also look to traditional canons of statutory construction to inform our interpretation," *Conrad v. Phone Directories Co.*, 585 F.3d 1376, 1381 (10th Cir. 2009), and "may seek guidance from Congress's intent, a

task aided by reviewing the legislative history," *In re Geneva Steel Co.*, 281 F.3d at 1178. "Ambiguous text can also be decoded by knowing the purpose behind the statute." *Id.*

Because text alone does not clarify the meaning of § 1447(d)'s "except" clause, we rely upon this full toolkit of statutory construction. *Cf. Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007) (using the "text's language, context, history, and purposes" to guide interpretation of the federal officer removal statute).

1. *Text and Context*

The "except" clause states "that an *order* remanding a case . . . removed pursuant to section 1442 or 1443 . . . shall be reviewable[.]" 28 U.S.C. § 1447(d) (emphasis added). Defendants seize upon this reference to "order," contending the "plain text of Section 1447(d) provides that, when a case is removed under Section 1442, the remand '*order*'—not just the applicability of the federal-officer ground for removal—is reviewable on appeal." Appellant Br. at 4; *see Lu Junhong*, 792 F.3d at 811 ("To say that a district court's 'order' is reviewable is to allow appellate review of the *whole* order, not just of particular issues or reasons."). We do not interpret the word "order" in isolation, however, for "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); *see also Deal v. United States*, 508 U.S. 129, 132 (1993) ("[T]he meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."); *United States v. Villa*, 589 F.3d 1334, 1343 (10th Cir. 2009) ("[T]he meaning of statutory language,

plain or not, depends on context." (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)). Here, the specific context of the "except" clause adds ambiguity to the meaning of "order," because § 1447(d) "treats Section 1442 and 1443 removal as distinct from other removals." Appellee Mot. for Partial Dismissal at 12. As the Counties state, because the "except" clause refers to removals "pursuant to section 1442 or 1443," not pursuant to those sections *in part*, it "does not expressly contemplate the situation in which removal is done pursuant to one of these sections *and* other grounds." *Id*. And as a result, it also does not expressly contemplate the situation in which remand is granted regarding such mixed grounds for removal.

By modifying its reference to appealability in such way, § 1447(d)'s "except" clause leaves no clear answer to what scope of appellate review is applied when both enumerated (§ 1442 or 1443) and unenumerated bases for federal subject matter jurisdiction are addressed in the same remand order. The *Lu Junhong* court impliedly conceded as much in asserting that "Section 1447(d) itself authorizes review of the remand order, because the case was removed (*in part*) pursuant to § 1442." 792 F.3d at 811 (emphasis added). In other words, to convey its point that the plain language of § 1447(d) creates plenary review of a remand order upon invocation of a federal officer removal basis, the Seventh Circuit was forced to modify that language with a clarifying parenthetical entirely absent from the statutory text. *Cf. BP Am., Inc. v. Oklahoma ex rel. Edmondson*, 613 F.3d 1029, 1033 (10th Cir. 2010) ("That second, italicized condition, however, appears nowhere in the statute, and we are not at liberty to take our editing pencils to what Congress has written."). We thus determine

that the specific context in which "order" is used in the "except" clause creates ambiguity regarding the ambit of our jurisdiction over appeals of mixed remand orders like the one here.

Contextual analysis next requires "examining the subsection's structure." *In re Woods*, 743 F.3d 689, 694 (10th Cir. 2014); *see Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). That is, § 1447(d)'s primary clause—"An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise"—must inform the reading of its secondary exception. *See In re Woods*, 743 F.3d at 694 (finding the statute at issue "best understood by breaking the provision into its two principal parts," amounting to the general rule and its exception); *see also Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 25 (1988) (reasoning that a statutory subsection should be "read in its entirety" to divine the meaning of an exception). Because the structure of § 1447(d) exhibits "a scheme whereby a default rule is subject to an exception, we are guided by the interpretive principle that exceptions to a general proposition should be construed narrowly." *In re Woods*, 743 F.3d at 699; *see Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989) ("In construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision."). "Flowing from this interpretive principle . . . is the related concept that exceptions must not be interpreted so broadly as to swallow the rule." *In re Woods*, 743 F.3d at 699; *see*

Cuomo v. Clearing House Ass'n, L.L.C., 557 U.S. 519, 530 (2009) (rejecting an interpretation of a statutory exception that "would swallow the rule"); *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1212 (10th Cir. 2006) (reading the impeachment exception to Fed. R. Evid. 407 "narrowly, lest it swallow the rule"); *In re Annis*, 232 F.3d 749, 753 (10th Cir. 2000) (rejecting a broad construction of a statutory exemption that "would swallow the rule").

Application of these guidelines leads us to believe that the "except" clause must be narrowly construed. *See In re Woods*, 743 F.3d at 698. As the Counties note, § 1447(d)'s "overall thrust," embodied in its primary clause, "is to impose one of the most categorical bars to reviewability found anywhere in federal law." Appellee Mot. for Partial Dismissal at 12; *see Osborn*, 549 U.S. at 262 (Scalia, J., dissenting) (noting that "[f]ew statutes read more clearly" than the primary clause of § 1447(d)); *Gravitt v. Sw. Bell Tel. Co.*, 430 U.S. 723, 723 (1977) (per curiam) (noting the clause's "unmistakabl[e] command[]"); *see also Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 642 (2006) ("Where the order is based on one of the [grounds enumerated in § 1447(c)], review is unavailable no matter how plain the legal error in ordering the remand." (alterations in original) (quoting *Briscoe v. Bell*, 432 U.S. 404, 413 n.13 (1977)). "Given that Congress has enacted [this] general rule" against remand reviewability, "we should not eviscerate that legislative judgment through an expansive reading of a somewhat ambiguous exception." *Clark*, 489 U.S. at 739. An expansive reading of § 1447(d)'s ambiguous "except" clause to allow for plenary review would risk just such an evisceration: it would let defendants skirt "the primary

operation of the provision," *see id.*—its absolute prohibition against appeal of the vast majority of subject matter jurisdiction-based remands—by simply including a colorable § 1442 or 1443 basis in their petition for removal. *Cf. Fed. Deposit Ins. Co. v. Alley*, 820 F.2d. 1121, 1124 (10th Cir. 1987) (holding that a prior version of "§ 1447(c) must be read disjunctively in order not to eviscerate the thrust of § 1447(d)"). A broad construction would likewise risk the exception swallowing the general rule, by turning § 1447(d)'s secondary clause into a jurisdictional loophole allowing appellants to do indirectly what they cannot do directly. If, alongside the two removal grounds it explicitly exempted, Congress intended the "except" clause to also lift the general bar to appellate jurisdiction over all unenumerated subject matter jurisdiction removal grounds, it could have clearly indicated this intent in the statutory text—for example, by modifying "pursuant to 1442 or 1443" with "in part." *Cf. Lu Junhong*, 792 F.3d at 811; Appellee Mot. for Partial Dismissal at 12.

Because Congress did not indicate any such intent, the phrase 'pursuant to section 1442 or 1443' must be construed "in a way that allows the rule's exception to function as just that—an exception." *In re Woods*, 743 F.3d at 699. Interpreting the "except" clause to create review of only its two enumerated removal bases, rather than all other bases rejected by a district court in an order also addressing those exceptions, serves to preserve, rather than erode, the "strong legislative mandate" against remand order reviewability, *Kennedy*, 273 F.3d at 1300, conveyed through § 1447(d)'s "long established policy," *In re Bear River Drainage Dist.*, 267 F.2d 849,

851 (10th Cir. 1959).[8] In thereby harmonizing § 1447(d)'s venerable baseline rule with its exception, the narrower interpretation of the scope of review created by the "except" clause preserves the subsection's overall structure and prevents "a serious and unacceptable risk of the exception consuming the rule." *In re Woods*, 743 F.3d at 700.

Instead of addressing this statutory context, Defendants argue that the scope of § 1447(d) review is clarified via *extra*-statutory context—namely, *Yamaha*'s interpretation of the word "order" in 28 U.S.C. § 1292(b). As introduced above, that provision permits a district court to certify an interlocutory order to the court of appeals for immediate discretionary review if the order "involves a controlling question of law as to which there is substantial difference of opinion."[9] In *Yamaha*, the Supreme Court determined whether, under § 1292(b), appellate courts can "exercise jurisdiction over any question that is included within the order that contains

[8] *Cf. Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978) (narrowly interpreting 28 U.S.C. § 1292(a)(1)'s "exception from the long-established policy against piecemeal appeals").

[9] Section 1292(b) reads, in relevant part:

> 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 which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order[.]

the controlling question of law identified by the district court[.]" 516 U.S. at 204. Per the text of § 1292(b), the Court held that "appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Id.* at 205. Therefore, "the appellate court may address any issue fairly included within the certified order." *Id.*

Even though *Yamaha* interpreted a distinct section of the Judicial Code concerning neither removal nor remand, the Court's interpretation of "order" might at first glance appear analogous, as both § 1292(b) and § 1447(d) contemplate the appealability of district court orders. *Cf. District of Columbia v. Carter*, 409 U.S. 418, 421 (1973) ("At first glance, it might seem logical simply to assume . . . that identical words used in two related statutes were intended to have the same effect."). But *Yamaha* did not "purport to establish a general rule governing the scope of appellate jurisdiction for every statute that uses that word." *City of Baltimore*, 952 F.3d at 460. While "there is a natural presumption that identical words used in different parts of the *same act* are intended to have the same meaning," *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) (emphasis added), no such presumption applies to the same word used in different statutes. And even regarding intra-statutory meaning, "the presumption is not rigid"—it "readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004) (quoting *Atl. Cleaners*, 286 U.S. at 433). Put more succinctly, "[c]ontext

counts." *Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 576 (2007). As such, the Supreme Court has "several times affirmed that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *Yates v. United States*, 574 U.S. 528, 537 (2015) (plurality opinion); *see id.* at 537–38 (listing examples).

Such is the case here: The contextual differences between § 1292(b), which speaks generally of any interlocutory district court order, and § 1447(d), which speaks specifically of remand orders with two express underlying bases, strongly suggest that the word "order" conveys varying content in the two statutes. Section 1292(b) broadly "permit[s] an appeal to be taken from *such order*," referring to "an order not otherwise appealable under this section"—that is, *any* non-final district court order besides the three specialized interlocutory varieties outlined in § 1292(a). *See In re Bear River*, 267 F.2d at 851 (stating that § 1292(b) "applies generally to 'a civil action' in which 'an order not otherwise appealable under this section' is made"). Section 1447(d), on the other hand, specifies the orders exempted from its general bar on reviewability with multiple identifying layers: "an order *remanding* a case . . . *removed pursuant to section 1442 or 1443*." (emphasis added). Because § 1292(b) imposes limits on neither the type of order that may be certified for review nor the underlying basis for such order, an appellate court reasonably "may address any issue fairly included within the certified order." *Yamaha*, 516 U.S. at 205. But because § 1447(d) *does* limit the orders that shall be reviewable by both type (remand) and basis (those removed pursuant to § 1442 or 1443), such limiting

language is sensibly read to cabin appellate review to the two enumerated removal bases contemplated by the statute, thereby animating a discrete kind of district court remand order. *Cf. Gustafson v. Alloyd Co.*, 513 U.S. 561, 577 (1995) ("Just as the absence of limiting language in § 17(a) [of the Securities Act of 1933] resulted in broad coverage, the presence of limiting language in § 12(2) requires a narrow construction."); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (reading the words surrounding "discovery" in a section of the tax code to "strongly suggest that a precise and narrow application was intended"). In short, "there is such variation in the connection in which the words are used" in each statute "as reasonably to warrant the conclusion that they were employed . . . with different intent." *Carter*, 409 U.S. at 421 (quoting *Atl. Cleaners & Dyers*, 286 U.S. at 433).

Strengthening our determination that "order" was employed with different intent in the two statutes is the basic observation that, while both § 1292(b) and § 1447(d) concern appellate review of lower court orders, they point in opposite directions. As the district court reasoned in rejecting Defendants' motion for a stay, "§ 1292(b) expressly authorizes appellate review of orders certified by the district court, while § 1447(d) explicitly bars review of any kind, with only two specified, narrow exceptions." *Boulder County II*, 423 F. Supp. 3d at 1071; *see also Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 130 (3d Cir. 1998) ("Section 1447(d) prohibits review of a particular type of district court order, namely a remand order under section 1447(c), whereas section 1292(b) is a more general grant of appellate

jurisdiction."). The Fourth Circuit expanded on this fundamental divergence in its opinion rejecting the same *Yamaha*-based textual argument advanced by Defendants:

> [Section] 1292(b) permits appellate review of important issues before final judgment, but it does not make otherwise non-appealable questions reviewable. Reading "order" to authorize plenary review thus makes sense in the § 1292(b) context, as § 1292(b) only affects the timing of review for otherwise appealable questions. But giving the word "order" the same meaning in the § 1447(d) context would mandate review of issues that are ordinarily unreviewable, period—even following a final judgment.

City of Baltimore, 952 F.3d at 460. We find this analysis persuasive. Put another way, to read "order" the same way in both § 1292(b) and § 1447(d) would ignore the distinction between a statute that "governs *when* an appellate court may review a particular question within its discretion" and one that "limits *which* issues are 'reviewable on appeal or otherwise.'" *Id.* (quoting § 1447(d)). Ignoring this distinction between the "*when*" and "*which*" of appealability would cut against the Supreme Court's directive to "take th[e] jurisdictional prescription [of § 1447(d)] seriously, however pressing the merits of the appeal might seem," *Powerex Corp.*, 551 U.S. at 238–39, contravene the mandate against expanding the limited statutory jurisdiction of the federal courts by judicial decree, *see Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994), and lead us into an interpretive pitfall the Court has repeatedly flagged—that is, "[t]he tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them," a tendency that "has all the tenacity of original sin and must constantly be guarded against," *Wachovia Bank*

v. Schmidt, 546 U.S. 303, 319 (2006) (quoting Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 Yale L.J. 333, 337 (1933)).

These differences between the two statutes, expressed in terms of both structure and function, have important practical application in assessing appellate jurisdiction, as both this court and others have noted. For example, *In re Bear River* addressed a district court's use of § 1292(b) to certify a controlling question of law contained in its order remanding a case to state court. 267 F.2d at 850. We held that appellate jurisdiction to review the remand order was lacking, because § 1447(d)'s specific prohibition overrode § 1292(b)'s general grant of jurisdiction: "While the generality of § 1292(b) might seem sufficient to encompass a remand order, it does not expressly either amend or repeal § 1447(d)," which "applies specially to prohibit appeals from remand orders." *Id.* at 851. In addressing the same issue decades later, the Third Circuit likewise concluded that "the jurisdictional bar of section 1447(d) trumps the power to grant leave to appeal in section 1292(b)," because "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Feidt*, 153 F.3d at 130 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)).

Bear River and *Feidt* provide added authority for our conclusion that the contextual contrast between the two statutes—§ 1292(b) being a general grant of appellate jurisdiction, and § 1447(d) being a specific prohibition of it—leads to the natural conclusion that the same word employed in each provision conveys a distinct meaning. *See, e.g.*, *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200,

213 (2001) (phrase "wages paid" means different things in different parts of Title 26 of the United States Code); *Shell Oil Co.*, 519 U.S. at 343–44 (term "employee" means different things in different parts of Title VII); *Carter*, 409 U.S. at 420 ("Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved."). Thus, *Yamaha*'s construction of "order" in § 1292(b) "does not compel symmetrical construction" of the same word "in the discrete . . . context[]" of § 1447(d). *See Cleveland Indians Baseball Co.*, 532 U.S. at 213. To the contrary, our analysis of § 1292(b) and § 1447(d) indicates that while the word "order" in the former statute allows for plenary review of all issues contained in a certified order, its use in the "except" clause contemplates remand orders addressing cases removed solely pursuant to § 1442 or 1443, and thus favors limiting remand order review to those specifically delineated removal bases.

Besides marshalling *Yamaha*, Defendants assert that our opinion in *Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240 (10th Cir. 2009), also "counsels in favor of review of the district court's entire order, not simply the ground that permitted appeal." Appellant Br. at 11. Like the district court, we are not convinced.

Coffey concerned a provision of CAFA, 28 U.S.C. § 1453(c)(1), that states "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." The defendants in *Coffey* removed to federal court based on both CAFA and the Comprehensive Environmental Response,

Compensation and Liability Act ("CERCLA"), and the district court remanded after determining it lacked subject matter jurisdiction under either statute. 581 F.3d at 1242. When the defendants appealed that remand order under § 1453(c)(1), the plaintiffs argued that appellate jurisdiction existed to review only whether removal was proper under CAFA, and not to review "the district court's order with respect to the CERCLA determination." *Id.* at 1247.

We held that § 1453(c)(1) did allow for discretionary review of the district court's determination regarding both the CAFA and CERCLA removal bases. *Id.* We found support for this conclusion in both *Yamaha*'s interpretation of § 1292(b) and the Seventh Circuit's application of *Yamaha* to § 1453(c)(1). In *Brill*, the Seventh Circuit determined it was "free to consider any potential error in the district court's decision, not just a mistake in application of [CAFA]," because "[w]hen a statute authorizes interlocutory appellate review, it is the district court's entire decision that comes before the court for review." 427 F.3d at 451–52 (citing *Yamaha*, 516 U.S. at 205). In *Coffey*, we "agree[d] with the *Brill* court that *Yamaha*'s analysis applies equally to" § 1453(c)(1). 581 F.3d at 1247. That statute "speaks in terms of the court of appeals accepting an appeal 'from an *order* of a district court granting or denying a motion to remand a class action.'" *Id.* (quoting § 1453(c)(1)). And it has "no language limiting the court's consideration solely to the CAFA issues in the remand order." *Id.*

We went on to hold, however, that while jurisdiction to review the district court's disposition of CERCLA removal existed, that jurisdiction was discretionary,

and was best declined under the circumstances. *Id.* at 1247–48. We reasoned that if remand had been granted solely on the CERCLA issue, § 1447(d) would bar review of the district court's order. *Id.* at 1247. Therefore, review of that issue would not fit within § 1453(c)(1)'s purpose, which is "to develop a body of appellate law interpreting [CAFA] without unduly delaying the litigation of class actions." *Id.* (alteration in original) (quoting S. Rep. No. 109-14, at 49 (2005)).

Defendants thus correctly note that this circuit has "already applied *Yamaha*'s rationale to another statutory provision concerning removal." Appellant Br. at 14. But we reject their argument that the removal provision construed in *Coffey* "contains statutory language that mirrors the language of [§] 1447(d) in all relevant aspects." *Id*. To reiterate, we emphasized in *Coffey* that § 1453(c)(1) contains "no language limiting the court's consideration solely to the CAFA issues in the remand order." 581 F.3d at 1247. However, § 1447(d), as discussed above, *does* have limiting language. While § 1453(c)(1) concerns "an order . . . to remand a class action," § 1447(d) concerns "an order remanding a case . . . *removed pursuant to section 1442 or 1443*." (emphasis added). "Class action" identifies a broad category of case, which a defendant can remove to federal court via any number of bases besides those created by CAFA.[10] *See* 28 U.S.C. § 1332(d)(1) (defining "class action" as "any civil action filed under [Federal Rule of Civil Procedure 23] or similar State statute or rule

[10] State court class actions were removable prior to the Class Action Fairness Act, provided they met the general requirements of 28 U.S.C. § 1446. CAFA simply made the removal of class actions easier. *See id.* § 1453(b).

of judicial procedure authorizing an action to be brought by 1 or more representative persons"); *id.* § 1453(b) (CAFA provision easing the requirements for class action removal). But "removed pursuant to section 1442 or 1443" identifies specific statutory removal bases that must be addressed in any corresponding remand order. Thus, while the language of § 1453(c)(1) does not limit the reviewing court to consider solely "CAFA issues in the remand order," the language of § 1447(d) can be read to limit the reviewing court to consider solely "[§ 1442 or 1443] issues in the remand order." *See Coffey*, 581 F.3d at 1247. If, as Defendants assert, § 1453(c)(1) mirrored the language of § 1447(d) in all relevant aspects, it would instead speak of an order to remand a class action "removed pursuant to section 1453(b)," the CAFA-specific removal provision.

Other textual differences between the statutes also counsel against applying *Coffey*'s interpretation of § 1453(c)(1) to § 1447(d)'s "except" clause. Section 1453(c)(1) allows for appellate jurisdiction over orders "granting or denying a motion to remand a class action," while the § 1447(d) exceptions call only for appellate review of orders granting such motions. More significantly, § 1453(c)(1), like § 1292(b), vests discretion regarding whether to allow review with the court, *see Edmondson*, 613 F.3d at 1033, while the appellate jurisdiction created by the § 1447(d) exceptions is mandatory. *Compare* § 1453(c)(1) ("[A] court of appeals *may accept* an appeal from an order of a district court." (emphasis added)), *and* § 1292(b) ("The Court of Appeals . . . *may thereupon, in its discretion, permit* an appeal to be taken from such order." (emphasis added)), *with* § 1447(d) ("[A]n order remanding a

case . . . removed pursuant to section 1442 or 1443 . . . *shall be reviewable*." (emphasis added)). These differences reflect opposing statutory thrusts: § 1447(d) being a provision that forecloses appellate jurisdiction, with two narrow exceptions, and § 1453(c)(1), like § 1292(b), being a provision that creates appellate jurisdiction—indeed, that explicitly carves it from § 1447(d)'s general prohibition. *See* § 1453(c)(1) ("except that notwithstanding § 1447(d) . . . ."). The distinction between granting control over appellate jurisdiction to the court, and ceding such control to the defendant—who is sole master of her petition for removal—further suggests the definition of "order" applied to § 1292(b) in *Yamaha* and imported to § 1453(c)(1) in *Coffey* is a poor fit for the unique context of § 1447(d). In other words, a more expansive scope of jurisdiction is sensible when the appellate courts may exercise their discretion as gatekeepers, but not when the defendant holds the key to appellate review.[11]

One further lesson relevant to our present task can be drawn from *Coffey*'s construction of § 1453(c)(1). The appellate discretion granted by that statute over whether to accept review of remand orders is framed as an either/or proposition: "a court of appeals may accept *an appeal from an order* . . . granting or denying a motion to remand a class action," not *part* of an appeal. 28 U.S.C. § 1453(c)(1)

[11] Compare, for example, the *Yamaha* Court's broad interpretation of the discretionary appellate jurisdiction created by 28 U.S.C. § 1292(b) with the narrow interpretation given by federal courts to the specific exceptions to the final judgment rule found in § 1291(a), which create mandatory appellate jurisdiction. *See generally United States v. Solco I, LLC*, --- F.3d ----, No. 19-4089, 2020 WL 3407013 (10th Cir. June 22, 2020).

(emphasis added). Under Defendants' reading of "an appeal from an order"—which would create "appellate review of the *whole* order, not just of particular issues or reasons," *Lu Junhong*, 792 F.3d at 811—the court of appeals would be required to exercise its discretion by either accepting review of the *entire* remand order (in effect, review of all bases for removal rejected by the district court and challenged by the defendant), or disclaiming appellate review entirely. It would not be permitted to chart a middle path by choosing to review only "particular issues or reasons" underlying the remand order. *See id.*

But such a middle path is exactly what was chosen in *Coffey*. We elected to review only one of the rejected bases for removal challenged by the defendants (the CAFA basis) while declining to exercise jurisdiction over the other (the CERCLA basis). *See* 581 F.3d at 1247–48. And we interpreted § 1453(c)(1) to allow for this jurisdictional partitioning based on our reading of the statutory purpose: that § 1453(c)(1) was aimed at developing CAFA doctrine in the courts of appeals, and that review of CERCLA removal would clearly not advance that purpose and would also not otherwise be allowable under § 1447(d). *Id.* Likewise here: section 1447(d) was aimed at accelerating litigation on the merits, *see Powerex Corp.*, 551 U.S. at 238, and reviewing the non-§ 1442 grounds for removal would clearly not advance that purpose and would also not otherwise be allowable under § 1447(d). *Coffey* therefore supports disclaiming appellate jurisdiction over aspects of a remand order "that would otherwise be unreviewable." *Boulder County II*, 423 F. Supp. 3d at 1071; *see also Parson v. Johnson & Johnson*, 749 F.3d 879, 893 (10th Cir. 2014) (declining

to exercise § 1453(c)(1) jurisdiction over the district court's decision to remand for lack of diversity jurisdiction, based in part on the absence of "freestanding appellate jurisdiction" over that non-CAFA ruling, "a factor we found significant in *Coffey*").

In sum, bearing in mind that "[a]mbiguity is a creature not of definitional possibilities but of statutory context," *Brown v. Gardner*, 513 U.S. 115, 118 (1994), our analysis of *Yamaha* and *Coffey* indicates that the word "order" in the singular statutory context of § 1447(d)'s "except" clause should not be read the same as it is in § 1292(b) and § 1453(c)(1). Specifically, comparing the three statutes convinces us that while "order" allows for plenary review in both § 1292(b) and § 1453(c)(1), the same word used in § 1447(d) extends appellate jurisdiction to only the § 1442 or 1443 removal bases addressed in a district court's remand. Statutory context is thus sufficient to lift the textual ambiguity that cloaks the "except" clause, revealing the narrower construction of § 1447(d) appealability to be the proper one.

We recognize, however, that the question of ambiguity is close, as our extended exegesis necessarily implies. And the circuit split on which way § 1447(d)'s purportedly plain meaning cuts also indicates that the "except" clause is "capable of being understood by reasonably well-informed persons in two or more different senses." *Quarrell*, 310 F.3d at 669 (quotation marks omitted). *Compare, e.g.*, *Lu Junhong*, 792 F.3d at 812 (calling its "application of *Yamaha Motor* and *Brill* to the word 'order' in § 1447(d) . . . entirely textual"), *and Decatur Hosp. Auth. v. Aetna Health, Inc.*, 854 F.3d 292, 296 (5th Cir. 2017) (stating its conclusion that § 1442 removal creates plenary review "flows from the text of § 1447(d)"), *with Glanton*,

107 F.3d at 1047 (dismissing appeal insofar as it challenged non-§ 1443 ground "follows from the clear text of § 1447(d)"), *and Jacks*, 701 F.3d at 1229 (retaining jurisdiction over part of remand order addressing § 1442, while rejecting jurisdiction over part addressing federal common law, based on "[t]he plain language of § 1447(d)"). In this circuit, such a clear divergence in the appellate courts on statutory plain meaning is not conclusive evidence of ambiguity, but it is worthy of some consideration. *In re S. Star Foods, Inc.*, 144 F.3d 712, 715 (10th Cir. 1998). Because the text of § 1447(d) is "arguably ambiguous," *see Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1097 (10th Cir. 2005), and has been interpreted inconsistently by the circuit courts, we venture beyond text and context to seek further elucidation of the "except" clause's scope of review. As we now discuss, the additional tools of statutory construction confirm our primary, context-based reading.

2. *Presumption Against Jurisdiction*

If an ambiguity is found in the text, "[w]e then look to presumptions that might aid our analysis." *Pritchett*, 420 F.3d at 1094. "Because the jurisdiction of federal courts is limited, there is a presumption against our jurisdiction." *Merida Delgado v. Gonzales*, 428 F.3d 916, 919 (10th Cir. 2005) (quotation marks omitted); *see Kokkonen*, 511 U.S. at 377. This presumption is manifested in "the deeply felt and traditional reluctance of th[e Supreme] Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes." *Romero v. Int'l Term. Op. Co.*, 358 U.S. 354, 379 (1959). Thus, "statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction."

F & S Const. Co. v. Jensen, 337 F.2d 160, 161 (10th Cir. 1964). This includes statutes authorizing federal appellate jurisdiction. *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 579 (1987); *see, e.g.*, *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) ("[O]ur practice of strict construction of statutes authorizing appeals dictates that we not give an expansive interpretation to the word 'State' [in 28 U.S.C. § 1254].").

The presumption against jurisdiction also applies with full force to removal. Interpreting a precursor to the general removal statute, 28 U.S.C. § 1441, the Court determined in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), that "[d]ue regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Id.* at 108–09 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)); *see also Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation." (interpreting § 1441)). As a result, "removal statutes[] are to be narrowly construed in light of our constitutional role as limited tribunals." *Pritchett*, 420 F.3d at 1094–95; *see also Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002).

Pritchett v. Office Depot, Inc. concerned the removal provisions of CAFA. *See* 420 F.3d at 1092. We acknowledged in *Pritchett* that while Congress sought to expand federal jurisdiction via those provisions, "when that expansion is made effective is what is at issue . . . , and that is an issue we approach cautiously." *Id.* at

1097 n.7 (citing *Shamrock*, 313 U.S. at 108–09); *see also Becenti v. Vigil*, 902 F.2d 777, 780 (10th Cir. 1990) (acknowledging that while Congress could authorize removal of tribal court actions against federal officers, at issue was whether it "has in fact done so" via 28 U.S.C. § 1442, and that the court "must be careful not to expand the jurisdiction of the federal courts beyond Congressional mandates"). Because this case concerns the scope of Congress's desired expansion of the specific exceptions to § 1447(d)'s general bar on remand order reviewability, we must likewise "approach cautiously." And while *Pritchett* and *Becenti* referenced statutes governing the procedure for removal, rather than "[p]rocedure after removal generally," *see* 28 U.S.C. § 1447, their logic should equally apply to § 1447(d), which governs removal's jurisdictional corollary. *See also* 28 U.S.C. §§ 1441–1455 (containing the chapter of the Judicial Code addressing "Removal of Cases from State Courts").

"Thus, if there is ambiguity as to whether the instant statute confers federal jurisdiction over this case, we are compelled to adopt a reasonable, narrow construction." *Pritchett*, 420 F.3d at 1095. By confining appellate review to only the § 1442 basis for removal, and not the handful of alternate § 1447(c) bases advanced by Defendants, the Counties' reading of § 1447(d) "is clearly the narrower of the two." *See Conrad v. Phone Directories, Inc.*, 585 F.3d 1376, 1382 (10th Cir. 2009). And it is also a reasonable reading, as evidenced by our contextual analysis and the weight of circuit authority interpreting the "except" clause. The presumption against jurisdiction thus supports our decision to adopt that reading.

3. *Legislative Ratification*

A second presumption that can help parse ambiguous text is the principle of legislative ratification—that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," or when it "adopts a new law incorporating sections of a prior law." *Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978); *see Consolidation Coal Co. v. Dir., Office of Workers' Comp. Programs*, 864 F.3d 1142, 1148 (10th Cir. 2017); *Bd. of Cty. Comm'rs v. E.E.O.C.*, 405 F.3d 840, 845 (10th Cir. 2005).

Both parties rely on this presumption to draw divergent meaning from Congress's passage of the Removal Clarification Act of 2011, which authorized appellate review of orders remanding cases removed pursuant to § 1442. Defendants contend that this revision to § 1447(d) incorporated the *Yamaha* Court's prior interpretation of the word "order," because "Congress is of course presumed to be aware of judicial interpretations of relevant statutory text." Appellant Br. at 10. As has been made clear, however, "*Yamaha* did not interpret the scope of § 1447(d), let alone involve a remand order." *City of Baltimore*, 952 F.3d at 460–61. And at the date of the Clarification Act's passage, *every* court of appeals to address the issue in a published opinion interpreted § 1447(d)'s "except" clause to create appellate jurisdiction only over the asserted § 1443 basis for removal, not the entire remand order. This included eight circuits[12] in a line of authority that continued unbroken

[12] *See Patel v. Del Taco, Inc.*, 446 F.3d 996, 998 (9th Cir. 2006); *Alabama v. Conley*, 245 F.3d 1292, 1293 n.1 (11th Cir. 2001); *Davis v. Glanton*, 107 F.3d 1044,

following the 1996 decision in *Yamaha*. *See also County of San Mateo*, 960 F.3d at 597 (stating that when the Clarification Act was passed, "no circuit court had applied *Yamaha* to § 1447(d) or discussed its applicability in that context").

Against this "backdrop of unanimous judicial interpretation," *id.*, the Clarification Act's sole revision to § 1447(d) was to insert "1442 or" before "1443," 125 Stat. at 546. Such a minor change evidences Congress's intent to adopt the existing appellate consensus regarding proper construction of the "except" clause. *See Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768, 782 (1985) (reasoning that the fact Congress amended a statute "without explicitly repealing" the established interpretation given it by the Court of Claims "gives rise to a presumption that Congress intended to embody [that court's interpretation] in the amended version"); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006) ("[W]hen 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well." (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998))). Legislative history affirms this intent to incorporate the established contemporaneous judicial interpretation: As the House Report on the Act stated, the revision to § 1447(d) "permit[ted] judicial review of

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1047 (3d Cir. 1997); *Thornton v. Holloway*, 70 F.3d 522, 523 (8th Cir. 1995); *State Farm Mut. Auto Ins. Co. v. Baasch*, 644 F.2d 94, 97 (2d Cir. 1981); *Noel v. McCain*, 538 F.2d 633, 635 (4th Cir. 1976); *Robertson*, 534 F.2d at 65; *Appalachian Volunteers*, 432 F.2d at 534.

§ 1442 cases that are remanded, *just as they are with civil rights cases.*" H.R. Rep. No. 112–17, pt. 1, at 7 (2011) (emphasis added). *Cf. Cannon v. Univ. of Chicago*, 441 U.S. 677, 696–98 (1979) (presuming Congress was aware of the prior federal district and circuit court interpretation of Title VI of the 1964 Civil Rights Act "and that that interpretation reflects their intent" with respect to Title IX, whose drafters "explicitly assumed that it would be interpreted and applied as Title VI had been").

"Absent a clear statutory command to the contrary, we assume that Congress is 'aware of the universality of th[e] practice' of denying appellate review of remand orders when Congress creates a new ground for removal." *Things Remembered*, 516 U.S. at 128 (alteration in original) (quoting *United States v. Rice*, 327 U.S. 742, 752 (1946)). Likewise, we will assume Congress was aware of the universality of denying plenary review of remand orders under the § 1447(d) "except" clause when it augmented that provision with a second narrow statutory avenue for appeal. Thus, if any judicial interpretation of relevant statutory text was ratified by Congress via 2011's Removal Clarification Act, it was the unanimous treatment of the scope of appellate review created by § 1447(d)'s civil rights exception by three quarters of the courts of appeals, and not the *Yamaha* Court's contrary reading of a single word in a distinct statute.[13]

[13] We join the Fourth and Ninth Circuits in reaching this conclusion. *See City of Baltimore*, 952 F.3d at 460–61; *County of San Mateo*, 960 F.3d at 597.

4. *Statutory Purpose*

"Where the language of a statute is arguably ambiguous, courts also look to public policy considerations to cast further elucidation on Congress'[s] likely intent." *Pritchett*, 420 F.3d at 1097. "Section 1447(d) reflects Congress's longstanding 'policy of not permitting interruption of the merits of a removed case by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.'" *Powerex Corp.*, 551 U.S. at 238 (quoting *Rice*, 327 U.S. at 751); *see Dalrymple v. Grand River Dam Auth.*, 145 F.3d 1180, 1185 n.8 (10th Cir. 1998) (referencing the "strong congressional policy against review of remand orders 'in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues'" (quoting *Thermtron*, 423 U.S. at 351)); *see also Osborn*, 549 U.S. at 227 (labeling § 1447(d) an "antishuttling provision[]").

Defendants argue that mandating review of the complete remand order "comports with" this statutory purpose of preventing delay, because

> [o]nce Congress has permitted appellate review of a remand order, an appellate court "has been authorized to take the time necessary to determine the right forum," and "[t]he marginal delay from adding an extra issue to a case where the time for briefing, argument, and decision has already been accepted is likely to be small."

Appellant Opp. to Mot. for Partial Dismissal at 9 (quoting *Lu Junhong*, 792 F.3d at 813). The leading treatise on federal civil procedure agrees: Although "it has been held that review [under § 1447(d)] is limited to removability under § 1443," it should "instead be extended to all possible grounds for removal underlying the order," for "[o]nce an appeal is taken there is little to be gained by limiting review." 15A

Charles A. Wright et al., *Federal Practice and Procedure* § 3914.11, at 706 (2d ed. 2019); *see* Appellant Opp. to Mot. for Partial Dismissal at 9.

The Counties contend this argument "is not obvious on its face," because "a court of appeals may be able to summarily dispose—even in an expedited manner—of a weak argument under Section 1442 . . . while it may require more time to consider a range of other, more complex federal jurisdictional issues." Appellee Mot. for Partial Dismissal at 10; *see, e.g.*, *Robertson v. Ball*, 534 F.2d 63, 66 n.5 (5th Cir. 1976) (contemplating summary dismissal of "an appeal from a remand when the removal purportedly based on § 1443 does not even colorably fall" under that statute). It was also not obvious to this court in *Coffey*: there, we declined to exercise discretionary jurisdiction over the remand order's non-CAFA issue because doing so would conflict with § 1453(c)(1)'s purpose of "develop[ing] a body of appellate law interpreting [CAFA] *without unduly delaying the litigation of class actions.*" 581 F.3d at 1247 (second alteration in original) (emphasis added) (quoting S. Rep. No. 109-14, at 49 (2005)).

This case provides a prime example of the potential delay occasioned by adding more complex federal jurisdictional issues to the appellate docket. As the district court reasoned in denying Defendants' motion to stay the remand order: "Unlike the situation in [*Lu*] *Junhong*, where 'the marginal delay from adding an extra issue to [a] case . . . [']would be small . . . the time needed to address the numerous additional jurisdictional issues in this case would be significant." *Boulder County II*, 423 F. Supp. 3d at 1071. In *Lu Junhong*, besides § 1442, the Seventh

Circuit needed to review only one other source of federal jurisdiction (admiralty jurisdiction under 28 U.S.C. § 1333). *See* 792 F.3d at 808. But here, expanding review to the entire remand order would force this court to grapple with complex judge-made doctrines of "arising under" jurisdiction—implicating federal common law, contested and substantial embedded federal issues, *see Grable*, 545 U.S. at 312–13, and the complete preemption doctrine[14]—in addition to more "bespoke jurisdictional law," *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 151 (D.R.I. 2019), pertaining to federal enclaves and the outer continental shelf. The pages of the Federal Supplement are rapidly filling with the extended discussions occasioned by application of these doctrines to global warming-based state law actions. *See, e.g.*, *Boulder County I*, 405 F. Supp. 3d at 956–79; *Mayor & City Council of Baltimore v.*

[14] Federal district courts have come out differently on these meaty issues of federal question jurisdiction, further demonstrating the potential for delay if this court was forced to weigh in on their proper resolution. *Compare California v. BP P.L.C.*, Nos. 17-06011 & 17-06012, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) (unpublished) (denying remand of global warming-related action and exercising federal subject matter jurisdiction based on federal common law), *rev'd sub nom City of Oakland v. BP P.L.C.*, 960 F.3d 570 (9th Cir. 2020), *and City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (finding federal common law governed state common law global warming-related claims), *with Bd. of Cty. Comm'rs of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019) (granting remand of similar global warming action and rejecting jurisdiction under federal common law, *Grable*, and complete preemption), *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019) (same), *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019) (same), *aff'd*, 952 F.3d 452 (4th Cir. 2020), *and County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) (same), *aff'd*, 960 F.3d 586 (9th Cir. 2020).

BP P.L.C., 388 F. Supp. 3d 538, 551–67 (D. Md. 2019), *aff'd*, 952 F.3d 452 (4th Cir. 2020).

It is thus not apparent that expanding the scope of § 1447(d) review will lead to merely marginal delay in litigation on the merits. To the contrary, the extra analysis necessitated by a broad interpretation has significant potential to foment "protracted litigation of jurisdictional issues," *Thermtron*, 423 U.S. at 351, "and prolong the interference with state jurisdiction that § 1447(d) clearly seeks to minimize," *Lambeth*, 443 F.3d at 760, thereby frustrating the statute's "clear Congressional policy of expedition," *Appalachian Volunteers, Inc. v. Clark*, 432 F.2d 530, 533 (6th Cir. 1970). Statutory purpose thus lends further support to our conclusion that the review granted by § 1447(d)'s "except" clause must be confined to the enumerated removal bases, for "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1226 (10th Cir. 2017) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 63–65 (2012)). This is especially so because a holding that only the explicit exceptions in § 1447(d) are appealable, besides shortening the travel time of this particular "intercourt shuttle," *Osborn*, 549 U.S. at 244, could also prevent some gratuitous trips entirely—for example, by encouraging parties with weak § 1442 or 1443 removal arguments to forego appeals,[15] or omit those two bases for removal in the first place.

[15] *Cf. Coffey v. Freeport McMoran Copper & Gold*, 581 F.3d 1240, 1242 n.2 (10th Cir. 2009) ("Defendants also argued that removal was authorized under 28

The potential for this latter result speaks to the Counties' "moral hazard" policy argument—that allowing for an expanded scope of review "would encourage removing parties to assert frivolous federal officer claims in order to bring otherwise nonappealable removal arguments to the court of appeals." Appellee Mot. for Partial Dismissal at 10. Similar moral hazard issues of appealability have not escaped judicial notice. In *Abney v. United States*, 431 U.S. 651 (1977), the Supreme Court held that a criminal defendant may immediately appeal a district court's rejection of her motion to dismiss an indictment on double jeopardy grounds "based on the special considerations permeating claims of that nature." *Id.* at 663. But it further determined that "obviously, such considerations do not extend" to allow the appeal of "other claims presented to, and rejected by, the district court in passing on the accused's motion to dismiss." *Id.* "Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence." *Id.* And while *Abney* was confined to the criminal context, "the concern expressed in *Abney* . . . bears on civil cases as well." *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 49–50 (1995).

In *Lu Junhong*, the Seventh Circuit reasoned that sanctions and summary resolutions are sufficient tools to combat citing § 1442 or 1443 in a notice of removal

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U.S.C. § 1442(a)(1). The district court disagreed, and that portion of the district court's decision [wa]s not . . . challenged on appeal."). *Coffey* was decided before Congress expanded § 1447(d)'s "except" clause to encompass § 1442 removal.

merely as "a hook to allow appeal of some different subject." 792 F.3d at 813; *see also* Wright et al., *supra*, § 3914.11, at 706 (acknowledging the "plausible concern" that interpreting § 1447(d) to allow for review of otherwise nonreviewable removal bases would lead to frivolous removal arguments, but arguing that "[s]ufficient sanctions are available to deter" that "sorry possibility"). But should the scope of § 1447(d) review be expanded, we harbor serious doubt that either tool will prove dexterous enough to prevent the delay of litigation on the merits Congress so clearly sought to avoid. As one Amicus notes, "[i]f alleging federal-officer removal opens the door to appellate review of all other asserted bases for removal, no lawyer would neglect to find a defensible, if inadequate, way to assert that peculiar form of removal to avoid the bar on interlocutory appeal for all other justifications for removal." Brief of Nat'l Lg. of Cities as Amicus Curiae at 17 n.4; *cf. Robertson*, 534 F.2d at 66 n.5 (expressing concern that appeals from remands of removals under § 1443 could "be used as a dilatory tactic"); *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018) (describing defendants' § 1442 argument as "dubious" in a case featuring substantially similar state law global warming-related causes of action and asserted grounds for removal), *aff'd*, 960 F.3d 586 (9th Cir. 2020).

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In sum, while the text of § 1447(d)'s "except" clause is arguably ambiguous, statutory context clarifies that the word "order" in that provision must be construed differently than the word "order" in 28 U.S.C. § 1292(b) and § 1453(c)(1). And the proper construction of the statute is the narrower one adopted by the majority of

federal circuits. We therefore hold that when a district court issues a remand order premised on a § 1447(c) ground, we are empowered to review that order only to the extent it addresses the removal bases explicitly excepted from § 1447(d)—in this case, removal under 28 U.S.C. § 1442.

III. FEDERAL OFFICER REMOVAL

Having determined 28 U.S.C. § 1447(d) supplies appellate jurisdiction only to review the district court's rejection of removal based on federal officer jurisdiction, we now address that issue. Questions of removal are reviewed de novo. *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1245 (10th Cir. 2012). ExxonMobil, as the party asserting federal officer removal, bears the burden of establishing jurisdiction by a preponderance of the evidence.[16] *Dutcher v. Matheson*, 733 F.3d 980, 985 (10th Cir. 2013). This burden is met by "a substantial factual showing," *Wyoming v. Livingston*, 443 F.3d 1211, 1225 (10th Cir. 2006), that supports "'candid, specific and positive' allegations," *In re MTBE Prods. Liab. Litig.*, 488 F.3d 112, 130 (2d Cir. 2007) (quoting *Willingham v. Morgan*, 395 U.S. 402, 408 (1969)).

The federal officer removal statute permits removal of state court actions filed against "any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act

[16] Suncor Energy asserts no basis for federal officer removal. *See* Appellant Br. at 38–39. However, unlike the typical removal petition, which requires joinder of all defendants, § 1442 allows for independent removal of an entire case by only one of several named defendants. *See Akin v. Ashland Chem Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998).

under color of such office." 28 U.S.C. § 1442(a)(1). The statute's "'basic purpose' is to protect against the interference with federal operations that would ensue if a state were able to arrest federal officers and agents acting within the scope of their authority and bring them to trial in a state court for an alleged state-law offense." *City of Baltimore*, 952 F.3d at 461 (quoting *Watson*, 551 U.S. at 150). Three fears animate this purpose: that "[s]tate-court proceedings may reflect 'local prejudice' against unpopular federal laws or federal officials," *Watson*, 551 U.S. at 150, "disable federal officials from taking necessary action designed to enforce federal law," *id.* at 152, or "deprive federal officials of a federal forum in which to assert federal immunity defenses,"[17] *id.* at 150. In short, "the removal provision was an attempt to protect federal officers from interference by hostile state courts." *Willingham*, 395 U.S. at 405. Unlike other removal statutes, it should "be liberally construed to give full effect to th[at] purpose[]." *Colorado v. Symes*, 286 U.S. 510, 517 (1932).

Section 1442(a)(1) removal can apply to private persons "who lawfully assist" federal officers "in the performance of [their] official duty," *Davis v. South Carolina*, 107 U.S. 597, 600 (1883), meaning the private person must be "authorized to act with

[17] Our precedent elevates this statutory concern above others. *See Christensen v. Ward*, 916 F.2d 1462, 1484 (10th Cir. 1990) ("The primary purpose for the removal statute is to assure that defenses of official immunity applicable to federal officers are litigated in federal court." (citing *Willingham v. Morgan*, 395 U.S. 402, 406–07 (1969)); *see also Jefferson County v. Acker*, 527 U.S. 423, 447 (1999) (Scalia, J., concurring in part) (asserting the "main point" of the statute "is to give officers a federal forum in which to litigate the merits of immunity defenses").

or for [federal officers or agents] in affirmatively executing duties under . . . federal law," *Watson*, 551 U.S. at 151 (alterations in original) (quoting *City of Greenwood v. Peacock*, 384 U.S. 808, 824 (1966)). And § 1442(a)(1) has also been interpreted to allow removal by private corporations that meet the statutory requirements. *See, e.g.*, *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 135–36 (2d. Cir. 2008).

> A private corporation may remove a case under § 1442(a)(1) if it can show: (1) that it acted under the direction of a federal officer; (2) that there is a causal nexus between the plaintiff's claims and the acts the private corporation performed under the federal officer's direction; and (3) that there is a colorable federal defense to the plaintiff's claims.[18]

Greene v. Citigroup, Inc., No. 99-1030, 2000 WL 647190, at *2 (10th Cir. May 19, 2000) (unpublished); *see also Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 254 (4th Cir. 2017).

ExxonMobil asserts federal officer removal jurisdiction based on its long-term mining of the Outer Continental Shelf ("OCS") for fossil fuels under government leases. Appellant Br. at 38; *see, e.g.*, App. 49, 62 ("Oil and Gas Lease of Submerged Lands Under the Outer Continental Shelf Lands Act."). To address this argument, we first lay out the regulatory background of these mineral leases.

The OCS "is a vast underwater expanse" beginning several miles off the coastline and extending seaward for roughly two hundred miles. *Ctr. for Sustainable*

[18] A colorable federal defense "constitutes the federal law under which the action against the federal officer arises for Art. III purposes." *Mesa v. California*, 489 U.S. 121, 136 (1989). This is required because the statute itself does not create a federal question, but "merely serves to overcome the 'well-pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged." *Id.*

Econ. v. Jewell, 779 F.3d 588, 592 (D.C. Cir. 2015). Its "subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C. § 1331(a). "Billions of barrels of oil and trillions of cubic feet of natural gas lie beneath the OCS." *Jewell*, 779 F.3d at 592. Pursuant to the Outer Continental Shelf Lands Act ("OCSLA"), the United States Department of the Interior ("DOI") administers a federal leasing program to develop and exploit the oil and gas resources in these submerged lands in a sustainable manner. App. 38; *see* 43 U.S.C. §§ 1331–1356(b); *Jewell*, 779 F.3d at 592 ("The [OCSLA] created a framework to facilitate the orderly and environmentally responsible exploration and extraction of oil and gas deposits on the OCS."). Under OCSLA, the Interior Secretary "is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding . . . any oil and gas lease" on the OCS, in exchange for payment of royalties. 43 U.S.C. § 1337(a)(1); *see County of San Mateo*, 960 F.3d at 602 ("[T]he government grants the lessee the right to explore and produce oil and gas resources in the submerged lands of the outer Continental Shelf, and in exchange the lessee agrees to pay the government rents and royalties."). ExxonMobil has participated in this competitive leasing program for decades and continues to conduct oil and gas operations under OCS leases. App. 40; *see* App. 61 (June 2016 DOI letter notifying ExxonMobil that its "bid for the [OCS] block described above is accepted"); App 62 (Ten-year ExxonMobil OCS lease starting July 1, 2016).

OCS lessees are required to conduct drilling in accordance with federally approved exploration, development, and production plans and conditions. App. 64

§ 9 (2016 lease exemplar); *see* 30 C.F.R. §§ 550.200–.299 (outlining the plans and documents that must be submitted to and approved by the Bureau of Ocean Energy Management before starting to drill under OCS leases). These plans must "conform to sound conservation practices to preserve, protect, and develop minerals resources and maximize the ultimate recovery of hydrocarbons from the leased area." App. 64 § 10. Lessees are obligated to "exercise diligence in the development of the leased area and in the production of wells located thereon," to "prevent unnecessary damage to, loss of, or waste of leased resources," and to "comply with all applicable laws, regulations and orders related to diligence, sound conservation practices and prevention of waste." App. 64 § 10. A much earlier OCS lease, from 1979, further stated that "[a]fter due notice in writing, the Lessee shall drill such wells and produce at such rates as the Lessor may require in order that the Leased Area or any part thereof may be properly and timely developed and produced in accordance with sound operating principles." App. 50 § 10.

DOI officials reserve the right to obtain "prompt access" to facilities and records of private OCS lessees for the purpose of federal safety, health, or environmental inspections. App. 64 § 12 (2016 lease). The federal government can precondition an OCS lease on a right of first refusal to purchase all production "[i]n time of war or when the President of the United States shall so prescribe." App. 68 § 15(d). The government also mandates that twenty percent of all crude or natural gas produced pursuant to OCS leases be offered to small or independent refiners, "as defined in the Emergency Petroleum Allocation Act of 1973." App. 68 § 15(c).

ExxonMobil argues that its participation in the OCS leasing program under these terms and conditions satisfies the "acting under" element of federal officer removal. Appellant Br. at 38. We disagree.

"The statutory phrase 'acting under' describes 'the triggering relationship between a private entity and a federal officer.'" *City of Baltimore*, 952 F.3d at 462 (quoting *Watson*, 551 U.S. at 149). While "[t]he words 'acting under' are broad," they are "not limitless." *Watson*, 551 U.S. at 147. In this context, "under" describes a relationship between private entity and federal superior typically involving "subjection, guidance, or control." *Id.* at 151 (quoting *Webster's New International Dictionary* 948 (2d ed. 1953)). Thus, a "private person's 'acting under' must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Id.* at 152. This "help or assistance necessary to bring a private person within the scope of the statute does *not* include simply *complying* with the law . . . , even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored." *Id.* at 152–53. Rather, "there must exist a 'special relationship' between" private firm and federal superior that goes beyond the fulfillment of regulatory or statutory requirements. *Isaacson*, 517 F.3d at 137 (quoting *Watson*, 551 U.S. at 157).

In *Watson*, the Supreme Court addressed whether the Philip Morris Companies were "acting under" a federal officer or agency when they advertised cigarettes as "light" in compliance with detailed Federal Trade Commission supervision of cigarette testing. 551 U.S. at 146–47. As private contracting was not at issue, the

Court disclaimed deciding "whether and when particular circumstances may enable private contractors to invoke the statute." *Id.* at 154. In an effort to establish the necessary amount of federal direction, however, the defendants highlighted various lower court cases that held government contractors could invoke § 1442 removal, "at least when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision." *Id.* at 153. The Court unanimously rejected this attempt to analogize the highlighted "close supervision" over contractors to "intense regulation" of firms, because "the private contractor in such cases is helping the Government to produce an item that it needs." *Id.* That is, "[t]he assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks." *Id.*

The *Watson* Court illustrated this point by reference to a Fifth Circuit case, *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998). *Winters* involved tort claims brought against chemical firms premised on their production of the defoliant known as Agent Orange under a Department of Defense contract for use in the Vietnam War. The Fifth Circuit concluded that both the "acting under" and causal nexus elements needed for a private company to remove under § 1442 were satisfied, due to "the government's detailed specifications concerning the make-up, packaging, and delivery of Agent Orange, the compulsion to provide the product to the government's specifications, and the on-going supervision the government exercised over the formulation, packaging, and delivery of Agent Orange." *Id.* at 400.

The chemical companies "provid[ed] the Government with a product that it used to help conduct a war," and "at least arguably . . . performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform." *Watson*, 551 U.S. at 154. As such, they had a "special relationship" with the government, *see id.* at 157, whereby they "help[ed] *carry out*[] the duties or tasks of the federal superior," *id.* at 152.

The Phillip Morris Companies also claimed § 1442 removal was appropriate because the FTC had delegated testing authority to an industry-financed laboratory and the companies were "acting pursuant to that delegation." *Id.* at 153–54. The Court disagreed, finding "no evidence of any delegation of legal authority from the FTC to the industry association to undertake testing on the Government agency's behalf." *Id.* at 156.

Watson teaches that a private contractor's compliance with statutory or regulatory mandates, even if complex, is insufficient to satisfy the "acting under" requirement for federal officer removal. Rather, the company must agree to help carry out the duties of the federal superior under that superior's strict guidance and control. *See In re MTBE*, 488 F.3d at 125 ("describing the need for some government intervention or control, other than that contemplated by a generally applicable regulatory scheme, as 'regulation plus'" (quoting *Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991))). In addition, this closely supervised and directed work must help federal officers fulfill basic government needs, accomplish key government tasks, or produce essential government products—that is, it must

stand in for critical efforts the federal superior would be required to undertake itself in the absence of a private contract, with wartime production being the paradigmatic example. *Compare Ruppel v. CBS Corp.*, 701 F.3d 1176, 1181 (7th Cir. 2016) ("Cases in which the Supreme Court has approved removal involve defendants working hand-in-hand with the federal government to achieve a task that furthers an end of the federal government."), *with County of San Mateo*, 960 F.3d at 600 ("[A] person is not 'acting under' a federal officer when the person enters into an arm's-length business arrangement with the federal government or supplies it with widely available commercial products or services."). Alternately, the requisite "special relationship" can be established through the explicit delegation of legal authority to act on the federal superior's behalf.

Here, ExxonMobil's OCS leases do not contemplate the "close supervision of the private entity by the Government," *Isaacson*, 517 F.3d at 137, needed to bring a federal contractor relationship within these strict parameters. We agree with the district court's determination that under the OCS leases "the government does not control the manner in which Defendants drill for oil and gas, or develop and produce the product." 405 F. Supp. 3d at 976; *accord City of Baltimore*, 952 F.3d at 466 ("[T]he leases do not appear to dictate that Defendants extract fossil fuels in a particular manner. . . . [n]or do they appear to vest the government with control over the composition of oil or gas to be refined and sold to third parties." (citations and quotation marks omitted)); *see also County of San Mateo*, 960 F.3d at 602–03 (holding the OCS leases do not require lessees to act under the government's "close

direction"). As the physical mining of OCS fuels is not subject to DOI's "detailed and ongoing control," *see Betzner v. Boeing Co.*, 910 F.3d 1010, 1015 (7th Cir. 2018), and as OCS-produced fuel need not conform to "highly detailed . . . specifications," *see Sawyer*, 860 F.3d at 253, ExxonMobil was not "acting under" a federal superior within the meaning of the federal officer statute. *Compare Bennett v. MIS Corp.*, 607 F.3d 1076, 1087–88 (6th Cir. 2010) (holding a mold remediation firm whose workers were directly supervised by on-site federal officers and escorted at all times by federal personnel, and whose "closely monitored" contract work was subject to "explicit parameters for site containment and waste disposal," satisfied the "acting under" requirement), *with Cabalce v. Thomas E. Blanchard & Assocs.*, 797 F.3d 720, 728 (9th Cir. 2015) (holding a company that contracted to store and destroy fireworks seized by the government did not act under a federal officer due to a "lack of any evidence of the requisite federal control or supervision over the handling of the seized fireworks").

ExxonMobil disputes the district court's finding of insufficient government control by asserting that "the operative leases explicitly afford the federal government the right to control the rates of mining and production." Appellant Br. at 40. It supports this contention by reference to a single clause in the 1979 lease: "After due notice in writing, the Lessee shall drill such wells and produce at such rates as the Lessor may require in order that the leased area . . . may be properly and timely developed[.]" App. 50 § 10. There is no similar clause in the 2016 lease, however, and no indication that the 1979 language remains in effect. *See* App. 50 § 3

(stating that the 1979 lease shall cover an initial five-year period, to be extended "so long thereafter" as production from or operation on the leased parcel continues). Additionally, there is no showing the government ever gave notice of its intent to direct ExxonMobil's drilling activity or rates of production by means of the OCS leases. The same is true with respect to the government's wartime right of first refusal over ExxonMobil's OCS output. Even if the exercise of these rights could create the necessary level of federal supervision, an issue we do not decide, ExxonMobil points us to no authority for the proposition that the reservation of such rights alone creates the "special relationship" needed for a private firm to invoke § 1442. *Cf. Mays v. City of Flint*, 871 F.3d 437, 447 (6th Cir. 2017) (disagreeing with the argument that the government's potential ability to intervene supports the invocation of federal officer removal in the absence of actual intervention). As a result, ExxonMobil has not met its "burden of providing 'candid, specific and positive' allegations that [it] w[as] acting under federal officers." *In re MTBE*, 488 F.3d at 130 (quoting *Willingham*, 395 U.S. at 408); *see also City of Baltimore*, 952 F.3d at 466 n.9 ("[T]he lack of any specificity as to federal direction leaves us unable to conclude that the leases rise to the level of an unusually close relationship, as required by the first 'acting under' prong.").

ExxonMobil's other attempts to parse the lease language in support of federal officer removal are likewise unavailing, *see Cabalce*, 797 F.3d at 729, because most of the contractual terms "are mere iterations of the OCSLA's regulatory requirements." *City of Baltimore*, 952 F.3d at 465; *accord County of San Mateo*, 960

F.3d at 603; *see, e.g.*, 43 U.S.C. § 1337(a)(1) (authorizing OCS leases to be granted "under regulations promulgated in advance"); *Jewell*, 779 F.3d at 594 (describing OCSLA as "a statute with a 'structure for every conceivable step to be taken' on the path to development of an OCS leasing site." (quoting *California v. Watt*, 668 F.2d 1290, 1297 (D.C. Cir. 1981))). For example, the plans and documents required by DOI to drill under OCS leases, which ExxonMobil advances as evidence of the government's "extensive control," Appellant Br. at 39, are detailed in Bureau of Ocean Energy Management regulations. *See* 30 C.F.R. §§ 550.211–.228 ("Contents of Exploration Plans"); *id.* § 550.241–.262 ("Contents of Development and Production Plans and Development Operations Coordination Documents"). And other lease terms cited by ExxonMobil as proof of close federal oversight—the requirement that a fifth of OCS production be offered to small or independent refiners, and the government's reservation of a wartime right of first refusal—are also duplications of regulatory details furnished by OCSLA. *See* 43 U.S.C. § 1337(b)(7) (OCS lessees must "offer 20 per centum of the crude oil, condensate, and natural gas liquids produced on such lease . . . to small or independent refiners"); *id.* § 1341(b) ("In time of war, or when the President shall so prescribe, the United States shall have the right of first refusal to purchase at the market price all or any portion of any mineral produced from the outer Continental Shelf."). Compliance with such legal requirements, no matter their complexity, cannot by itself create the "acting under" relationship required to support a federal officer claim. *Watson*, 551 U.S. at 153. Something more is needed—there must be "regulation plus." *In re*

MTBE, 488 F.3d at 125 (quoting *Bakalis*, 781 F. Supp. at 145). And here, this "plus" factor is absent from what appear to be "standard-form" leases containing mostly "boilerplate" provisions. *See County of San Mateo*, 960 F.3d at 602; *City of Baltimore*, 952 F.3d at 465.

A holding that "simple compliance" with the statutory and regulatory requirements embedded in these standard-form, boilerplate lease terms satisfies the "acting under" relationship would risk "expand[ing] the scope of the statute considerably" to include "state-court actions filed against private firms in many highly regulated industries." *See Watson*, 551 U.S. at 153 ("Neither language, nor history, nor purpose lead us to believe that Congress intended any such expansion."). Such a result is incompatible with the *Watson* Court's careful articulation of when a private firm can invoke federal officer removal. We thus agree with the Fourth and Ninth Circuits that "the willingness to lease federal property or mineral rights to a private entity for the entity's own commercial purposes, without more[,]' cannot be 'characterized as the type of assistance that is required' to show that the private entity is 'acting under' a federal officer." *County of San Mateo*, 960 F.3d at 603 (quoting *City of Baltimore*, 952 F.3d at 465).

Additionally, the OCS leases do not meet the "acting under" parameters because they do not call for production specially conformed to government use—the type of contract that "involve[s] an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 152. *See Sawyer*, 860 F.3d at 255 (stating that courts often find the "acting under" requirement satisfied "where a

contractor seeks to remove a case involving injuries arising from equipment that it *manufactured for the government*"); *Mays*, 871 F.3d at 445 ("[A] government contractor entitled to removal would presumably be contractually required to follow the federal government's specifications in making products or providing services.").

In the Agent Orange cases, for example, the military provided precise specifications to private firms that "included use of the two active chemicals in unprecedented quantities for the specific purpose of stripping certain areas of Vietnam of their vegetation." *Winters*, 149 F.3d at 399; *see also Betzner*, 910 F.3d at 1015 (holding that Boeing "acted under the military's detailed and ongoing control" in "manufactur[ing] heavy bomber aircraft for the United States Air Force"); *Sawyer*, 860 F.3d at 253, 255 (holding that a contractor "acted under the Navy" in manufacturing boilers "to match highly detailed ship specifications and military specifications provided by the Navy"). Here, ExxonMobil is not tailoring its output to detailed federal formulations customized to meet pressing federal needs. Rather, it is leasing federal land to facilitate commercial production of a standardized, undifferentiated consumer product. *See Jewell*, 779 F.3d at 607 (determining DOI's decision "not to earmark the point of consumption of OCS-derived energy" was rational "[b]ecause oil and natural gas are fungible and traded on integrated global markets"). And even assuming federal authorities purchase some of the fuel extracted by ExxonMobil from the OCS—the same as other buyers on the global markets—supplying the government "with widely available commercial products or services" does not create the special relationship or assistance necessary to trigger "acting

under" removal. *County of San Mateo*, 960 F.3d at 600. Clearly, then, this "arrangement is not the procurement relationship that in previous cases has allowed a private firm to enjoy the benefit of federal officer removal." *City of Walker v. Louisiana*, 877 F.3d 563, 571 (5th Cir. 2017).

Lastly, ExxonMobil cannot show the delegation of legal authority that the *Watson* Court hypothesized would be sufficient to conclude a private corporation was "acting under" a government superior. No highlighted lease provision "establish[es] the type of formal delegation that might authorize [ExxonMobil] to remove the case." *Watson*, 551 U.S. at 156; *see County of San Mateo*, 960 F.3d at 602 ("The leases do not require that lessees act on behalf of the federal government."). And "neither Congress nor federal agencies normally delegate legal authority to private entities without saying that they are doing so." *Watson*, 551 U.S. at 157.

Our determination that ExxonMobil was not "acting under" federal officers in drilling pursuant to OCS leases is not altered by the OCS's status as a "vital national resource reserve held by the Federal Government for the public." 43 U.S.C. § 1332(3). While the leasing of OCS mining rights at least arguably implicates national energy needs, the facilitation of fossil fuel resource development by private companies is not a critical federal function in the same vein as law enforcement, *see Watson*, 551 U.S. at 151 (referencing a "private person" who "acts as an assistant to a federal official in helping that official to enforce federal law"); *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1099 (9th Cir. 2018) (stating that the "paradigm" for a private party's § 1442 removal is a "person acting under the direction of a federal law

enforcement officer"), military manufacturing, *see Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 813 (3d Cir. 2016) (labeling a government contract to manufacture military aircraft "an archetypal case" of a private firm acting under a federal officer), or wartime production, *see Isaacson*, 517 F.3d at 137 (reasoning that defendants "provide[d] a product that the Government was using during war" and that it otherwise "would have had to produce itself"). This conclusion is "a matter of statutory purpose," *Watson*, 551 U.S. at 152: As the Ninth Circuit reasoned in rejecting an identical § 1442 removal argument, by leasing government land for the commercial extraction of fossil fuels, private oil and gas firms are not "engaged in an activity so closely related to the government's function" that they might face the "significant risk of state-court 'prejudice'" that animates federal officer removal. *County of San Mateo*, 960 F.3d at 603 (quoting *Watson*, 551 U.S at 152); *see Watson*, 551 U.S. at 152 ("When a company subject to a regulatory order (even a highly complex order) complies with the order, it does not ordinarily create a significant risk of state-court 'prejudice.'").[19]

[19] State-court claims against oil and gas firms operating under federal mineral leases also do not "disable federal officials from taking necessary action designed to enforce federal law." *Watson*, 551 U.S. at 152. As an example of this risk, *Watson* cited *Tennessee v. Davis*, 100 U.S. 257 (1879), where a federal revenue officer was charged with murder in state court for killing a man during a sanctioned raid on an illegal distillery. That type of hostile provincial proceeding, and others that might similarly "paralyze the operations of the [federal] government," *id.* at 263, is inapposite to the typical suit against a government contractor, which does not center on federal officers "enforcing a locally unpopular national law," *Wyoming v. Livingston*, 443 F.3d 1211, 1222 (10th Cir. 2006).

While "private contractors performing tasks for the government are sometimes covered under section 1442," ExxonMobil "take[s] this idea too far." *Panther Brands, LLC v. Indy Racing Lg., LLC*, 827 F.3d 586, 590 (7th Cir. 2016). The OCS leases "represent arms-length commercial transactions whereby ExxonMobil agreed to certain terms (that are not at issue in this case) in exchange for the right to use government-owned land for [its] own commercial purposes." *Boulder County I*, 405 F. Supp. 3d at 977. Such mineral rights leases—which call for neither products nor services specially tailored to meet fundamental federal needs—do not fulfill the "acting under" element of federal officer removal. The district court therefore correctly rejected the attempt to remove this action under 28 U.S.C. § 1442(a)(1). Because ExxonMobil has not established it sufficiently assisted a federal superior's duties through its participation in the OCS leasing program, we decline to reach the additional § 1442(a)(1) removal requirements of a causal nexus and a colorable federal immunity defense. *See Riggs v. Airbus Helicopters, Inc.*, 939 F.3d 981, 990 n.9 (9th Cir. 2019).

IV. CONCLUSION

Title 28, U.S. Code § 1447(d) empowers us to review only the district court's decision regarding removal under 28 U.S.C. § 1442(a)(1). ExxonMobil failed to establish proper grounds for federal officer removal. We therefore **AFFIRM** the district court's remand order to the extent it rejects removal under § 1442(a)(1) and **DISMISS** the remainder of this appeal. The Counties' motions for partial dismissal and for summary affirmance are granted and dismissed as moot, respectively.

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RE: 19-1330, Boulder County Commissioners, et al v. Suncor Energy, et al
Dist/Ag docket: 1:18-CV-01672-WJM-SKC

Dear Counsel:

Attached is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. If requesting rehearing en banc, the requesting party must file 6 paper copies with the clerk, in addition to satisfying all Electronic Case Filing requirements. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,



Christopher M. Wolpert
Clerk of the Court

cc: Clinton Frederick Beckner III
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