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## Wishing to be Part of that Court: How the Supreme Court's Decision in BP P.L.C. v. Mayor of Baltimore Lets Energy Companies Wander Free and Drown the Shore up Above

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WISHING TO BE PART OF THAT COURT:  
HOW THE SUPREME COURT'S DECISION IN  
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I. WHAT'S THE WORD? AN INTRODUCTION TO A BURNING  
LITIGATION FIRE

Climate change litigation has substantially increased both domestically and internationally in recent years.<sup>1</sup> In the United States, many state and local governments are initiating lawsuits based on state law theories in an attempt to hold energy companies accountable for their contributions to climate change.<sup>2</sup> These companies are delaying litigation in response, which comes at a hefty price to all involved.<sup>3</sup>

A longstanding question exists regarding whether federal or state court is the proper venue for climate change litigation.<sup>4</sup> Arguments on either side generally proceed as follows: proponents of cases being in federal court believe climate change is an inherently federal issue, whereas those favoring review in state court argue state court is the more appropriate venue to recover monetary dam-

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1. See United Nations, *Climate Litigation Spikes, Giving Courts an 'Essential Role' in Addressing Climate Crisis*, UN NEWS (Jan. 26, 2021), <https://news.un.org/en/story/2021/01/1083032> (citing report finding climate change cases have increased in frequency in past three years and have become more successful); see also Giuliana Viglione, *Climate Lawsuits are Breaking New Legal Ground to Protect the Planet*, NATURE (Feb. 28, 2020), <https://www.nature.com/articles/d41586-020-00175-5> (noting environmentalists are optimistic about increased litigation's potential impact on future climate change relief).

2. Dino Grandoni, *States and Cities Scramble to Sue Oil Companies Over Climate Change*, WASH. POST (Sept. 14, 2020, 5:31 PM), <https://www.washingtonpost.com/climate-environment/2020/09/14/states-cities-scramble-sue-oil-companies-over-climate-change/> (explaining states, cities, and local governments are suing energy companies for contributing to climate change).

3. See Emma F. Blake, *Kicking the Climate Can Down the Road: BP v. Baltimore and Chevron v. Oakland*, HAUSFELD FOR THE CHALLENGE (July 20, 2021), <https://www.hausfeld.com/what-we-think/perspectives-blogs/kicking-the-climate-can-down-the-road-bp-v-baltimore-and-chevron-v-oakland/> (exploring procedural delay in litigating climate change cases and discussing climate change's high cost).

4. See Mike Theroux, Laura Gill & Jon McKay, *Win for American Energy Companies Facing Climate Change Litigation*, BENNETT JONES (June 1, 2021), <https://www.bennettjones.com/Blogs-Section/Win-for-American-Energy-Companies-Facing-Climate-Change-Litigation> (examining venue question in light of *BP P.L.C. v. Mayor of Baltimore*).

ages.<sup>5</sup> Due to the obscure nature of this jurisdictional question, environmentalists and energy companies have long awaited the day when the United States Supreme Court would provide clearer guidance.<sup>6</sup>

In October 2020, the Supreme Court decided to hear a seemingly promising case in *BP P.L.C. v. Mayor of Baltimore*.<sup>7</sup> The Court, however, only offered guidance on 28 U.S.C. § 1447(d), which provides when a remand order is reviewable, and declined to rule on the case's broader environmental issues.<sup>8</sup> Although this decision adds to the existing body of Supreme Court environmental jurisprudence, the Court has yet to issue a clear answer on whether climate change litigation belongs in federal or state court.<sup>9</sup>

This Note explores the intersection of civil procedure and environmental law, concluding the Supreme Court's holding benefits energy companies by allowing them to prolong litigation and burdens both appellate courts and local governments.<sup>10</sup> Part II provides the facts of *BP P.L.C.*<sup>11</sup> Part III summarizes the case's relevant legal precedent and supplies a background on the § 1447(d),

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5. See David Hasemyer, *The Supreme Court Hears Arguments on Climate Change. Is It Ready to Decide Which Courts Have Jurisdiction?*, INSIDE CLIMATE NEWS (Jan. 20, 2021), <https://insideclimatenews.org/news/20012021/supreme-court-climate-change-jurisdiction/> (summarizing why certain parties prefer federal or state court for climate change litigation). See generally *Challenges to Environmental Protection in the Courts Continued*, ENV'T L. INST., <https://www.eli.org/program-constitution-courts-legislation/challenges-environmental-protection-courts-continued> (last visited Mar. 14, 2022) (explaining arguments relating to federal preemption of state law).

6. See Grandoni, *supra* note 2 (detailing trajectory of climate change lawsuits, particularly in federal court system).

7. 141 S. Ct. 1532, 1543 (2021) (holding § 1447(d) permits appellate courts to review all parts of district court's remand order).

8. *Id.* at 1536 (stating claim's merits were irrelevant to appeal).

9. See *id.* at 1543 (articulating Court's holding); see also David Hasemyer, *The Supreme Court Sidesteps a Full Climate Change Ruling, Handing Industry a Procedural Win*, INSIDE CLIMATE NEWS (May 18, 2021), <https://insideclimatenews.org/news/18052021/the-supreme-court-sidesteps-a-full-climate-change-ruling-handing-industry-a-procedural-win/> (noting Court's reluctance to decide more significant climate change venue issue); Lesley Clark, *Judges to Hit Key Climate Question: State or Federal Court?*, E&E NEWS: CLIMATEWIRE (Nov. 30, 2021, 6:17 AM), <https://www.eenews.net/articles/judges-to-hit-key-climate-question-state-or-federal-court/> (exploring recent cases discussing whether climate change litigation belongs in state or federal court).

10. For a discussion of *BP P.L.C.*'s potential impact on energy companies, appellate courts, and local governments, see *infra* notes 194-224 and accompanying text.

11. For a discussion of *BP P.L.C.*'s facts and procedural history, see *infra* notes 16-43 and accompanying text.

§ 1442, and general environmental venue issues.<sup>12</sup> Part IV analyzes the Supreme Court's decision and reasoning in *BP P.L.C.*<sup>13</sup> Part V contends the majority's opinion perpetuates inequitable litigation that runs contrary to the reason Congress amended § 1447(d).<sup>14</sup> Finally, Part VI discusses the case's impact on energy companies, the broader electorate, appellate courts, Congress, and — ultimately — the future of federal and state climate law.<sup>15</sup>

## II. BETCHA THE FOURTH CIRCUIT UNDERSTANDS AND THEY REMAND: THE FACTS OF *BP P.L.C.*

Since approximately 2017, various states, cities, and counties across the United States have sued energy companies for climate change-related damages.<sup>16</sup> These complaints generally allege the companies' activities directly contribute to climate change and cause deteriorating conditions which the cities are responsible for repairing.<sup>17</sup> To cover these costs, local governments have sought monetary damages in court.<sup>18</sup>

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12. For a discussion of the relevant civil procedure and environmental background, see *infra* notes 44-116 and accompanying text.

13. For a discussion of the Supreme Court's holding and reasoning in *BP P.L.C.*, see *infra* notes 117-70 and accompanying text.

14. For a critical analysis of the Court's decision in *BP P.L.C.* and a discussion of its potential consequences, see *infra* notes 171-93 and accompanying text.

15. For a discussion of *BP P.L.C.*'s impact, see *infra* notes 194-224 and accompanying text.

16. See, e.g., *Mayor of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 548 (D. Md. 2019) (articulating Baltimore alleged energy companies contributed substantially to climate change); *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 939 (N.D. Cal. 2018) (discussing climate change lawsuit against various energy companies based on state law theories); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 469-70 (S.D.N.Y. 2019) (noting claims against similar energy companies to recover monetary damages related to climate change destruction), *aff'd sub nom. City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 146 (D.R.I. 2019) (providing Rhode Island sued energy companies for climate change-related damages in state court).

17. See, e.g., *BP P.L.C.*, 388 F. Supp. 3d at 548 (stating Baltimore sued various energy companies in state court to recover costs related to climate change); *Cnty. of San Mateo*, 294 F. Supp. 3d at 937 (explaining local governments sought monetary damages for injuries localities sustained); *City of New York*, 325 F. Supp. 3d at 470-72 (noting city brought claims against energy companies to recover damages for companies' greenhouse gas emissions); *Rhode Island*, 393 F. Supp. 3d at 146-47 (indicating states and localities are alleging companies contributed to climate change and are seeking damages based on state tort theories).

18. See David Hasemyer, *Five States Have Filed Climate Change Lawsuits, Seeking Damages from Big Oil and Gas*, INSIDE CLIMATE NEWS (Sept. 15, 2020), <https://insideclimateneews.org/news/15092020/climate-change-lawsuit-connecticut-deleware/> (observing various states and localities are suing energy companies to recover costs related to climate change).

The City of Baltimore was one of the parties that participated in these lawsuits, suing multiple energy companies in the Circuit Court for Baltimore City, a Maryland state court.<sup>19</sup> Baltimore alleged the energy companies concealed information about their products' negative environmental impacts to the public's detriment.<sup>20</sup> Further, Baltimore claimed the energy companies contributed to extreme weather events and argued the energy companies — rather than taxpayers — should pay for the damages.<sup>21</sup> Baltimore accordingly brought forth eight state-based causes of action, including public and private nuisance, failure to warn, strict liability and negligent design defect, and trespass claims.<sup>22</sup> Baltimore also alleged the energy companies violated the Maryland Consumer Protection Act by engaging in misleading trade practices when the companies published product information contrary to scientific data.<sup>23</sup>

As mentioned, Baltimore initially sued the various energy companies in Maryland state court.<sup>24</sup> Generally, if a plaintiff files a lawsuit in state court, a defendant has the opportunity under federal law to “remove” the case by arguing it actually belongs in federal

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19. Complaint ¶¶ 20-31, *Mayor of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2018) (No. 18-2357) (outlining lawsuit against twenty-six energy companies for their role in climate change). Baltimore alleged it was not trying to prevent the energy companies from continuing their day-to-day operations. *Id.* ¶ 12 (limiting litigation goal to recovering monetary damages from companies rather than completely prohibiting companies' conduct).

20. *Id.* ¶¶ 141-70 (alleging defendant energy companies knew about environmental harm but failed to publicly disclose information to public). Baltimore alleged the defendants should have warned the public and that their failure to do so was “deceptive.” *Id.* ¶ 170 (arguing defendants should have taken precautions to limit contributions to climate change).

21. *Id.* ¶ 12 (detailing specific ways in which energy companies destroyed physical environment). Baltimore explicitly stated the energy companies were responsible for increasing sea levels and temperatures, unusual weather events, and other environmental harm that “local taxpayers” should not bear the financial burden of repairing. *Id.* (arguing energy companies should pay for damages).

22. *Id.* ¶ 11 (listing eight causes of action). Baltimore brought all causes of action against every defendant. *Id.* (asserting eight causes of action against each defendant).

23. *Id.* ¶¶ 11, 292-98 (alleging energy companies misled consumers through unscrupulous marketing tactics). Baltimore alleged that the energy companies profited by “misleading” customers. *Id.* ¶¶ 295-98 (reasoning practices also harmed city).

24. Complaint, *supra* note 19 ¶¶ 33-35 (explaining how Circuit Court for Baltimore City had jurisdiction and was proper venue for case). Baltimore stated this local court was appropriate because the claims “arose” in Baltimore, one of the defendants conducted business in Baltimore, and the court had the requisite personal jurisdiction over all defendant energy companies. *Id.* (outlining jurisdictional and venue bases for state court to hear case).

court.<sup>25</sup> Defendants often invoke removal in hopes that a better outcome will result in federal court.<sup>26</sup> The general removal statute, 28 U.S.C. § 1441, allows defendants to remove civil cases from state to federal court if the federal court has jurisdiction to hear them.<sup>27</sup>

In response to Baltimore's complaint, the energy companies attempted to remove the case to federal court by invoking the federal officer removal statute, 28 U.S.C. § 1442, as one of multiple bases for removal.<sup>28</sup> This statute allows individuals or corporations working on behalf of the federal government to remove a case to federal court.<sup>29</sup> Baltimore then challenged the energy companies' removal request, arguing the case belonged in state court.<sup>30</sup> The United States District Court for the District of Maryland agreed with Baltimore and remanded the case to the original Maryland state court.<sup>31</sup> The energy companies then requested the Fourth Circuit reverse the district court's judgment.<sup>32</sup> Although appellate courts like the Fourth Circuit generally do not have the authority to review a district court's order remanding a case back to state court, they do

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25. 28 U.S.C. § 1446(a) (providing option for defendants to move case from state court to federal court).

26. See Lonny Hoffman & Erin Horan Mendez, *Wrongful Removals*, 71 FLA. L. REV. F. 220, 225 (2020) (explaining defendants often invoke 28 U.S.C. § 1442(a)(1), another removal statute). Congress enacted the federal officer removal statute in 1815 primarily to eliminate risk of local prejudice, believing federal courts could better handle conflicting state law. *Id.* at 225-26 (discussing statute's history and purpose).

27. 28 U.S.C. § 1441(a) (providing option for defendants to move case to federal court from state court). Section 1446 provides the general procedure for removal actions. 28 U.S.C. § 1446 (articulating requirements and steps defendants must take to remove case pursuant to Rule 11 of Federal Rules of Civil Procedure).

28. Notice of Removal by Defendants Chevron Corp. and Chevron U.S.A., Inc., Mayor of Baltimore v. BP P.L.C., No. 1:18-CV-02357, 2018 WL 1007518, at \*1-4 (D. Md. July 20, 2018) (arguing removal to federal court was proper under various federal civil procedure statutes). The energy companies argued Baltimore was suing them for activities within the federal government's purview involving issues related to national security and energy policy; accordingly, the energy companies further argued removal to the federal court under the federal officer statute was appropriate. *Id.* at \*2 (moving to dismiss plaintiff's claims under Rule 12 of Federal Rules of Civil Procedure on basis that defendant energy companies had contracted with federal government for fuel and other sales related to military use).

29. 28 U.S.C. § 1442(a) (allowing certain parties to remove action from state to federal court); FED. R. CIV. P. 81(c), Note to Subdivision (c) (listing relevant removal statutes and permitting federal officers to remove cases to federal court).

30. Mayor of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538, 549 (D. Md. 2019) (explaining procedural background of case after companies attempted to remove case to federal court).

31. *Id.* (holding all bases defendants asserted for removal were inadequate and remanding case to local court).

32. Appellant's Opening Brief, Mayor of Baltimore v. BP P.L.C., No. 19-1644, 2019 WL 3491806, at \*3 (4th Cir. Mar. 6, 2019) (arguing federal courts should resolve global warming claims).

have that power when a district court partly bases a remand order on either 28 U.S.C. § 1442 or § 1443, the latter of which provides federal jurisdiction for civil rights cases.<sup>33</sup>

On appeal, the Fourth Circuit interpreted the pertinent removal statute, § 1447(d), as authorizing appellate courts to review a remand order narrowly; this meant the court would only review the parts of the remand order pertaining to § 1442 or § 1443.<sup>34</sup> Accordingly, the Fourth Circuit's narrow interpretation meant the court lacked jurisdiction to review the parts of the district court's remand order that did not deal with either § 1442 or § 1443.<sup>35</sup> Thus, the Fourth Circuit only analyzed whether § 1442 warranted removal to federal court.<sup>36</sup> The Fourth Circuit ultimately held the energy companies did not qualify as federal officers because their contracts with the federal government were merely "incidental" and the activities Baltimore alleged in its initial complaint were not "sufficiently related" to the energy companies' work as federal contractors.<sup>37</sup>

The energy companies then appealed the Fourth Circuit's decision, petitioning the Supreme Court to review the case.<sup>38</sup> The energy companies made three arguments in favor of Supreme Court review.<sup>39</sup> Their first argument was that the Fourth Circuit's decision involved a circuit split as to the correct interpretation of

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33. *BP P.L.C. v. Mayor of Baltimore*, 952 F.3d 452, 458 (4th Cir. 2020) (recounting defendants' request that Fourth Circuit review district court's remand order), *cert. granted*, 141 S. Ct. 1532 (2021). Appellate courts only have jurisdiction to review remand orders in specific circumstances under § 1447(d), though it was unclear what exactly those circumstances were before this case. *Id.* at 459-61 (explaining § 1447(d)'s authority granting appellate review in certain situations).

34. *Id.* at 460-61 (holding in favor of narrow review limited to § 1442 or § 1443 parts of remand order).

35. *Id.* at 461 (ruling no jurisdiction existed for appellate court to review entire remand order).

36. *Id.* at 461-71 (scrutinizing defendants' federal officer argument but deciding not to impose sanctions).

37. *Id.* (determining companies did not meet "acted under" or "causal-nexus" prongs of federal officer test). For a private corporate defendant to qualify as a federal officer, it must show three things: (1) the company "act[ed] under" a federal officer," (2) the company "has a colorable federal defense," and (3) "the charged conduct was carried out for [or] in relation to the asserted official authority." *Id.* at 461-62 (citing *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 254 (4th Cir. 2017)) (holding district court applied incorrect standard and manufacturer met proper requirements).

38. *Petition for a Writ of Certiorari, BP P.L.C. v. Mayor of Baltimore*, No. 19-1189, 2020 WL 1557798, at \*4 (4th Cir. Mar. 2020) (appealing Fourth Circuit's decision and petitioning for Supreme Court to grant writ of certiorari).

39. *Id.* at \*11-23 (arguing Supreme Court review was appropriate to resolve circuit split, Fourth Circuit's decision was incorrect, and frequency of issue demanded further review).

§ 1447(d) and, therefore, Supreme Court review was essential to provide guidance to lower courts.<sup>40</sup> Second, the energy companies argued the Fourth Circuit's interpretation of § 1447(d) was incorrect because it was inconsistent with the statute's purpose and Supreme Court precedent.<sup>41</sup> Lastly, the energy companies argued a Supreme Court ruling on this issue was necessary to reconcile frequent contradictory holdings.<sup>42</sup> Though the Supreme Court had been relatively hesitant to reenter a climate change debate, it did so in 2020 in *BP P.L.C.*<sup>43</sup>

### III. UNPACKING A TREASURE TROVE UNTOLD: A BACKGROUND ON THE ROLE OF CIVIL PROCEDURE IN *BP P.L.C.* AND CLIMATE CHANGE LITIGATION

Government entities regularly pursue litigation against energy companies due to their negative impacts on the physical environment.<sup>44</sup> In response, energy companies often invoke procedural arguments in their attempts to have more favorable law control the case or to delay litigation.<sup>45</sup> An overview of the harmful impact energy companies have on the environment, the general environmental venue question the Court declined to answer, the relevant civil procedure statutes the Court did address, and the relevant prece-

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40. *Id.* at \*11-17 (noting appellate court decision was similar to other circuit decisions).

41. *Id.* at \*17-20 (explaining Fourth Circuit was incorrect to limit scope of appellate review).

42. *Id.* at \*20-23 (stating recurring conflict presented ideal case for Supreme Court review).

43. *BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1537 (granting certiorari to review whether § 1447(d) provides appellate review over remand order's entirety). In October 2021, the Supreme Court decided to hear *West Virginia v. EPA*, another climate case dealing with the Environmental Protection Agency's (EPA) discretion regarding greenhouse gas regulation. See Lexi Smith, *Supreme Court to Weigh EPA Authority to Regulate Greenhouse Pollutants*, YALE CLIMATE CONNECTIONS (Nov. 7, 2021), <https://yaleclimateconnections.org/2021/11/supreme-court-to-weigh-epa-authority-to-regulate-greenhouse-pollutants/> (acknowledging upcoming Supreme Court case and summarizing Court precedent relating to EPA's role in regulating climate change).

44. See Daniel Farber, *The Climate Change Lawsuits Against Big Oil, Explained*, THE APPEAL (Jan. 29, 2021), <https://theappeal.org/the-lab/explainers/the-climate-change-lawsuits-against-big-oil-explained/> (explaining climate change lawsuits and state and local governments' reasons for suing energy companies).

45. See *State Suits Against Oil Companies*, STATE ENERGY & ENV'T IMPACT CTR.: NYU SCH. OF L., <https://www.law.nyu.edu/centers/state-impact/issues/climate-action/suits-against-oil-companies> (last visited Dec. 26, 2021) (recounting various climate change lawsuits in which energy companies sought removal to different courts).



dent the Court cited in its reasoning are helpful to contextualize *BP P.L.C.*<sup>46</sup>

#### A. Energy Companies' Impact on Climate Change

Energy companies negatively affect the environment in various ways.<sup>47</sup> For instance, they emit large amounts of greenhouse gases and other pollutants into the air and water through their everyday operations.<sup>48</sup> These operations also generate potentially dangerous waste that harms the environment and causes problems future generations will have to confront.<sup>49</sup>

Regulatory bodies and energy companies themselves have tried to limit these negative impacts.<sup>50</sup> For example, the Environmental Protection Agency (EPA) has regularly issued regulations designed to decrease energy companies' greenhouse gas emissions.<sup>51</sup> Additionally, the EPA and other regulatory bodies have encouraged energy companies to consider less harmful alternatives, primarily focusing on renewable energy.<sup>52</sup> Energy companies have implemented some changes to comply with regulatory requirements, but still contribute a significant portion of total greenhouse gas emissions.<sup>53</sup>

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46. For a discussion of the relevant issues and background relating to *BP P.L.C.*, see *infra* notes 47-116 and accompanying text.

47. See *About the U.S. Electricity System and Its Impact on the Environment*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/energy/about-us-electricity-system-and-its-impact-environment> (July 14, 2021) (providing overview of ways energy companies harm environment and contribute to climate change).

48. *Id.* (detailing how fuel burning contributes to increasing greenhouse gas emissions and pollutants).

49. *Id.* (describing types of waste and impact on physical environment).

50. *Id.* (summarizing ways to mitigate further harm).

51. See *Regulations for Emissions from Vehicles and Engines*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/regulations-emissions-vehicles-and-engines> (Aug. 26, 2021) (providing EPA's various regulations relating to transportation, including guidance on greenhouse gas emissions).

52. See *About the U.S. Electricity System and Its Impact on the Environment*, *supra* note 47 (focusing on how renewable energy can help decrease greenhouse gas emissions).

53. See Peter Eavis & Clifford Krauss, *What's Really Behind Corporate Promises on Climate Change?*, N.Y. TIMES, <https://www.nytimes.com/2021/02/22/business/energy-environment/corporations-climate-change.html> (May 12, 2021) (detailing how corporations contribute to rising greenhouse gas levels despite pledging to decrease emissions).

## B. The Venue Question

United States environmental law varies by jurisdiction and operates through myriad sources.<sup>54</sup> Congress has enacted key statutes, such as the Clean Water Act and the Clean Air Act, and has authorized agencies like the EPA to regulate these laws.<sup>55</sup> State and local governments, however, have also implemented their own laws that sometimes impose harsher penalties on polluters.<sup>56</sup> Many environmentalists argue Congress has not enacted comprehensive federal climate change legislation comparable to state and local legislation.<sup>57</sup>

Over the last few years, politicians and regulators have pressed energy companies to reduce their greenhouse gas emissions.<sup>58</sup> Part of this pressure has come in the form of litigation, which puts energy companies at risk of liability for significant financial penalties.<sup>59</sup> To decrease and delay liability, energy companies argue cases should be litigated in federal court because climate change is a global and national issue rather than a local issue.<sup>60</sup> Further, energy companies point out the “effects of climate change” are national.<sup>61</sup> Energy companies also generally disfavor state and local courts because these venues potentially have more theories of liability compared to what federal law offers.<sup>62</sup> For instance, the energy

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54. Paul Tanaka, Michael Saretsty, Donna Ni, Maddy Foote & Matthew Swanson, *Environmental Law and Practice in the United States: Overview*, KIRKLAND & ELLIS (May 21, 2021), <https://www.kirkland.com/publications/article/2021/05/environmental-law-and-practice-in-the-united-state> (outlining federal environmental law).

55. *Id.* (providing examples of key federal environmental legislation); *see, e.g.*, Clean Water Act, 33 U.S.C. § 1251(d) (granting EPA power to regulate water pollutants); Clean Air Act, 42 U.S.C. § 7401 et seq. (authorizing EPA to regulate emissions and air pollutants).

56. *See* Complaint, *supra* note 19, ¶ 11 (listing claims Baltimore alleged, including claims under Maryland Consumer Protection Act).

57. *See Congress and Climate Change*, CTR. FOR CLIMATE AND ENERGY SOLS., <https://www.c2es.org/content/congress-and-climate-change/> (last visited Oct. 12, 2021) (urging Congress to take action in absence of comprehensive climate change legislation).

58. United Nations, *supra* note 1 (explaining increasing climate litigation against energy companies worldwide).

59. *See* Hasemyer, *supra* note 5 (acknowledging dozens of climate cases across country).

60. *Id.* (noting energy companies prefer federal court).

61. *See, e.g.*, Brief of Atlantic Legal Foundation as Amicus Curiae in Support of Petitioners, BP P.L.C. v. Mayor of Baltimore, No. 19-1189, 2020 WL 6930644, at \*5-6 (U.S. Nov. 24, 2020) (arguing climate change is inherently federal because emissions cross state lines and do not affect just one location).

62. *See, e.g.*, Complaint, *supra* note 19, ¶¶ 218-98 (explaining theories of liability available in Maryland).

companies in *BP P.L.C.* may have been liable under Maryland's specific private and public nuisance statutes as well as Maryland's Consumer Protection Act; these claims, however, would not necessarily be available in federal court.<sup>63</sup>

Conversely, state and local governments argue climate change is not solely a federal issue because state-specific climate change laws have existed and provided remedies for a relatively long time.<sup>64</sup> States and localities contend energy companies must comply with both federal and state law.<sup>65</sup> Moreover, state and local governments note state courts often hear cases dealing with both federal and state laws.<sup>66</sup> These governmental bodies reject the argument that climate change is solely a federal issue, acknowledging state courts have historically heard these cases.<sup>67</sup> Additionally, state and local governments prefer litigation in state courts because these courts allow states to both exercise broader police power and use potential litigation awards more effectively.<sup>68</sup> These damages essentially go directly to the local government, who can then use the funds to repair and mitigate climate change destruction instead of worrying about the federal government apportioning too little of the potential award.<sup>69</sup>

The recent upswell in climate change litigation in federal appellate courts has particularly concerned environmentalists.<sup>70</sup> Many environmentalists have questioned what this increase might mean for climate change accountability.<sup>71</sup> Notably, the Supreme Court has been reluctant to make any sweeping determination regarding the proper venue for climate change litigation, presumably

63. *See id.* (outlining each state-specific cause of action).

64. *See, e.g.*, Brief of the States of Maryland, California, Connecticut, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington as Amici Curiae Supporting Plaintiff-Appellee, *BP P.L.C. v. Mayor of Baltimore*, No. 19-1644, 2019 WL 4200203, at \*16-17 (4th Cir. Sept. 3, 2019) (arguing City's claims do not "arise under federal common law" and that "consequences of climate change often are felt locally").

65. *See id.* at \*7-8 (providing examples in which federal law did not preempt state laws).

66. *See id.* at \*7-9 (asserting state courts often hear cases even if federal law is on point).

67. *See id.* at \*7-8 (rejecting counter arguments).

68. *See id.* at \*18-20 (explaining why states favor litigation in state court).

69. *See* Hasemyer, *supra* note 5 (noting how localities utilize monetary rewards from climate litigation).

70. *See* Grandoni, *supra* note 2 (observing environmentalists' growing activism in response to increasing litigation).

71. *Id.* (discussing rising litigation's impact on climate change accountability).

due in part to the issue's highly political nature.<sup>72</sup> The Court has only addressed more minor issues within the larger venue question, specifically in cases like *Massachusetts v. EPA*<sup>73</sup> and *American Electric Power Co. v. Connecticut*.<sup>74</sup>

In *Massachusetts*, the Court analyzed whether the Clean Air Act authorized the EPA to regulate greenhouse gas emissions, ultimately holding this was within the EPA's power.<sup>75</sup> Similarly, in *American Electric Power Co.*, the Court held the Clean Air Act preempted application of federal common law.<sup>76</sup> Because the Court ruled that federal law controlled the public nuisance claims in these cases, energy companies and their lobbyists frequently cite these decisions when arguing that climate change litigation belongs exclusively in federal court.<sup>77</sup>

### C. The § 1442 And § 1447(d) Questions

Civil procedure rules often have a much more significant impact on litigation than a case's central theory.<sup>78</sup> Federal courts are courts of limited jurisdiction, meaning they can only hear certain types of cases.<sup>79</sup> Conversely, state courts generally have broader jurisdiction; federal courts often presume a case belongs in state

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72. See Shawn M. LaTourette, *Global Climate Change: A Political Question?*, 40 RUTGERS L.J. 219, 284 (2008) (noticing Court's failure to address climate change suits and suggesting climate change does not necessarily invoke political question doctrine).

73. 549 U.S. 497, 498-501 (2007) (holding states may sue EPA for failing to regulate greenhouse gases).

74. 564 U.S. 410, 424 (2011) (ruling states and cities cannot sue corporations for greenhouse gas emissions under federal common law). More specifically, the Court ruled the EPA has the primary authority to regulate emissions under the Clean Air Act. *Id.* (ruling EPA's authority to regulate under Clean Air Act displaces federal common law).

75. *Massachusetts v. EPA*, 549 U.S. 497, 528-32 (2007) (scrutinizing EPA's authority under Clean Air Act).

76. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (holding statute "displace[s] any federal common-law right[s]").

77. See Brief of Amicus Curiae Energy Policy Advocates in Support of the Petitioners, *BP P.L.C. v. Mayor of Baltimore*, No. 19-1189, 2020 WL 7049220, at \*5 (U.S. Nov. 23, 2020) (arguing Supreme Court precedent clearly supports federal preemption of state climate law).

78. See E. Farish Percy, *It's Time for Congress to Snap to It and Amend 28 U.S.C. § 1441(1)(B)(2) to Prohibit Snap Removals That Circumvent the Forum Defendant Rule*, 73 RUTGERS U. L. REV. 579, 580 (2021) (stating general belief that litigation location substantially affects civil torts cases).

79. U.S. CONST., art. III, § 2 (authorizing federal courts to hear "cases and controversies" as defined by Constitution). See generally 28 U.S.C. §§ 1251-1631 (providing statutory authority for federal courts to hear particular kinds of cases).

court if it is unclear whether the case should be in one venue or the other.<sup>80</sup>

The statute the Court analyzed in *BP P.L.C.*, § 1447(d), is a removal statute that specifically contemplates one of the statutory grounds for removing a case to federal court: 28 U.S.C. § 1442.<sup>81</sup> Section 1442 permits federal officers to remove a case to federal court.<sup>82</sup> To successfully invoke the statute, the defendant must show three elements: (1) that it is “‘acting under’ a federal officer,” (2) that it has a “colorable federal defense,” and (3) “that the charged conduct was carried out for o[r] in relation to the asserted official authority.”<sup>83</sup>

A related civil procedure issue turns on § 1447(d)’s language.<sup>84</sup> Section 1447(d) grants appellate courts the power to review orders remanding a case to state court when a defendant removes the case “pursuant to section 1442 or 1443 of [Title 28].”<sup>85</sup> Originally, § 1447(d) only contemplated § 1443.<sup>86</sup> In 2011, however, Congress amended § 1447(d) by adding § 1442 as a basis for removal; in fact, a House Report expresses Congress’s intention was to give federal officers, such as politicians, the ability to move cases from state to federal court to avoid local bias or prejudice.<sup>87</sup>

80. *See* 28 U.S.C. §§ 1251-1631 (inferring states are generally able to hear cases federal courts do not have jurisdiction to hear).

81. *See* *BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1536 (2021) (outlining issues before Court); 28 U.S.C. § 1447(d) (granting appellate courts power to review certain remand orders). In addition to § 1442, § 1447(d) also allows defendants to remove a case to federal court when a defendant invokes § 1443. *Id.* (permitting removal for either § 1442 or § 1443).

82. 28 U.S.C. § 1442 (providing avenue for removal for certain defendants).

83. *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 254-55 (4th Cir. 2017) (listing requirements for manufacturer in case to be considered federal officer under statute). The court noted the statute’s goal was “to protect the Federal Government from . . . interference with its ‘operations.’” *Id.* at 254 (quoting *Watson v. Philip Morris Cos.*, 551 U.S. 142, 150 (2007)) (providing background on § 1442).

84. 28 U.S.C. § 1447(d) (outlining procedure for appellate review when case is removed pursuant to specific removal statutes, including § 1442).

85. *Id.* (allowing appellate review in specific circumstances). Although appellate courts generally do not have the power to review such an order, there are instances such as this in which review is statutorily permitted. *Id.* (examining appellate review when defendants invoke § 1442).

86. Act effective Sept. 30, 1996, Pub. L. No. 102-198, § 10(b), 105 Stat. 1626 (codified as amended at 28 U.S.C. § 1447(d)) (outlining technical corrections to Judicial Improvements Act of 1990 and other provisions); 28 U.S.C. § 1447 (considering only civil rights statute § 1443).

87. H.R. REP. NO. 112-17, pt. 1, at 3 (2011) (expressing Congress’s desire to remove suits to federal court when local prejudice is at issue). In the House Report, Congress posed a hypothetical lawsuit involving a House Representative to illustrate the need for the statutory amendment and notably did not consider government contractors or other kinds of federal officers. *Id.* at 3-4 (providing specific example in report).

A circuit split arose concerning whether § 1447(d) permits broad appellate review over the entirety of a federal district court's remand order back to state court or narrow appellate review of only those portions concerning § 1442 or § 1443.<sup>88</sup> Seven circuits interpreted § 1447(d) to permit a narrow review that only considers the parts of an order dealing with § 1442 or § 1443, whereas three circuits interpreted the statute to allow a broad review of the entire remand order.<sup>89</sup> The Fourth Circuit's decision added uncertainty to the circuit split on the issue of how broadly courts should interpret § 1447(d).<sup>90</sup> Courts in favor of a narrow review held § 1447(d) only authorized appellate review over § 1442 or § 1443 issues and not every issue in the remand order because the statute explicitly mentioned those bases.<sup>91</sup> Contrarily, courts favoring a broader review concluded § 1447(d) authorized appellate review over every issue based on § 1447(d)'s plain meaning and similar Supreme Court precedent.<sup>92</sup> This circuit split confused both the state and local governments filing climate change lawsuits and the defendant energy companies.<sup>93</sup> As a result, energy companies asked the Supreme Court to resolve the circuit split.<sup>94</sup> Subsequently, the Su-

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88. *See, e.g., Rhode Island v. Shell Oil Prods. Co.*, 979 F.3d 50, 53 (1st Cir. 2020) (holding appellate court only had authority to review federal officer and civil rights parts of remand order); *Cnty. of San Mateo v. Chevron Corp.*, 960 F.3d 586, 598 (9th Cir. 2020) (favoring review of only federal officer and civil rights portions of remand order); *Bd. of Cnty. Comm'rs v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 806-07 (10th Cir. 2020) (rejecting argument that § 1447(d) allows broad review of entire remand order); *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 811 (7th Cir. 2015) (splitting from other appellate courts with respect to interpretation of § 1447(d)).

89. *See, e.g., Rhode Island*, 979 F.3d at 53 (affirming district court's decision); *Cnty. of San Mateo*, 960 F.3d at 598 (requiring only narrow review); *Bd. of Cnty. Comm'rs*, 965 F.3d at 806-07 (rejecting defendants' argument that § 1447(d) permits broad review over all parts of remand order); *Lu Junhong*, 792 F.3d at 811 (favoring broad review of entire remand order).

90. *See, e.g., BP P.L.C. v. Mayor of Baltimore*, 952 F.3d 452, 460-61 (4th Cir. 2020) (limiting appellate review to specific issues in remand order).

91. *See, e.g., Rhode Island*, 979 F.3d at 53 (holding court did not have jurisdiction over any other claims); *Cnty. of San Mateo*, 960 F.3d at 598 (favoring limited appellate review); *Bd. of Cnty. Comm'rs*, 965 F.3d at 819 (interpreting § 1447(d) as only authorizing review over federal officer or civil rights removal claims).

92. *See, e.g., Lu Junhong*, 792 F.3d at 811 (holding § 1447(d) grants broad appellate review over remand orders).

93. *Petition for a Writ of Certiorari*, *supra* note 38 (comparing Fourth Circuit's decision to similar suits).

94. *Id.* (petitioning Supreme Court to review Fourth Circuit's decision in light of other analogous pending suits).

preme Court decided to grant certiorari to provide clarity on the scope of appellate review § 1447(d) provides.<sup>95</sup>

#### D. Supreme Court Precedent

In *BP P.L.C.*, the Supreme Court exclusively reviewed § 1447(d)'s second clause for the first time.<sup>96</sup> This meant that precedent interpreting § 1447(d)'s phrase "an order remanding a case" was virtually nonexistent.<sup>97</sup> As such, the Court relied on precedent contemplating similar appellate review issues and procedural statutes to decide this case.<sup>98</sup> *Baltimore*, the energy companies, and the Supreme Court primarily focused their arguments and reasoning on comparing this case to *Yamaha Motor Corp., U.S.A. v. Calhoun*.<sup>99</sup>

First, *Yamaha* proved to be a significant case in analyzing the meaning of § 1447(d)'s ordinary language because it dealt with a similar civil procedure statute, 28 U.S.C. § 1292(b).<sup>100</sup> One of the issues in *Yamaha* was whether § 1292(b) provides appellate jurisdiction over a district court's particular question or over the entirety of a district court's order.<sup>101</sup> Section 1292(b) involves a similar issue to § 1447(d) regarding the scope of appellate review.<sup>102</sup> The Court

95. *BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1537 (granting certiorari to review whether § 1447(d) provides appellate review over remand order's entirety).

96. For a discussion of other precedent the Supreme Court reviewed relating to § 1447(d)'s other parts, see *infra* notes 132-47 and accompanying text.

97. 28 U.S.C. § 1447(d) (describing which remand orders are and are not reviewable on appeal). For a discussion of relevant Supreme Court precedent, see *infra* notes 99-116 and accompanying text.

98. See generally *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 204-05 (1996) (interpreting similar procedural statute grants appellate review over all questions in order); *Murdock v. City of Memphis*, 87 U.S. 590, 635-36 (1874) (holding federal court had duty to review entire case); *United States v. Keitel*, 211 U.S. 370, 398-99 (1908) (understanding statute to only make certain decisions appealable); *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 638 (2009) (addressing § 1447(d)'s first clause and holding it only applies to certain remand orders); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976) (holding district courts may not decline to hear cases defendants properly removed to federal court).

99. *Yamaha*, 516 U.S. at 204-05 (holding § 1292(b) provides broad appellate review over any question and not just controlling question). In particular, the Court reasoned that the word "involves" illustrates when an appellate court may review a district court order and, therefore, did not limit appellate review only to the controlling question of law. *Id.* (providing relatively short opinion on § 1292(b)'s correct interpretation).

100. See *id.* (analyzing § 1292(b)'s scope of appellate review).

101. *Id.* (outlining § 1292(b) issue).

102. 28 U.S.C. § 1292(b) (granting appellate courts authority to exercise interlocutory jurisdiction over issues within remand order).

in *Yamaha* focused solely on § 1292(b)'s text, noting the statute states "[t]he Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken *from such order* . . ." <sup>103</sup> This language signifies appellate courts have jurisdiction over the entire order and not the particular question. <sup>104</sup> Although the Court decided the § 1292(b) question in *Yamaha* without difficulty, the Court in that case notably did not make a broad declaration that *all* procedural statutes authorizing appellate review over district court rulings, like § 1447(d), automatically grant appellate jurisdiction over every issue within the ruling. <sup>105</sup>

Additionally, other Supreme Court precedent addressing appellate jurisdiction includes cases in which the Court held for a narrow scope of review. <sup>106</sup> Precedent favorable to Baltimore includes cases such as *Murdock v. City of Memphis* <sup>107</sup> and *United States v. Keitel*. <sup>108</sup> In *Murdock*, the Court limited its scope of appellate jurisdiction by declining to rule on the state law portions of the state court's decision; instead, the Court only reviewed the federal law issues the state court contemplated. <sup>109</sup> *Keitel* involved a similar limitation of appellate review. <sup>110</sup> In that case, the Court held only certain decisions included in the Criminal Appeals Act were reviewable on appeal. <sup>111</sup> Other cases involving statutory concerns about § 1447(d) include *Carlsbad Technology, Inc. v. HIF Bio, Inc.* <sup>112</sup> and *Thermtron Products, Inc. v. Hermandsdorfer*. <sup>113</sup> Those cases examined § 1447(d)'s first clause regarding its relationship to a lack of sub-

103. *Yamaha*, 516 U.S. at 205 (citing § 1292(b)'s language).

104. *Id.* at 204 (reasoning that word "involves" before phrase "controlling question" serves to describe when appellate review is appropriate and not scope of review itself).

105. *See id.* (limiting analysis specifically to § 1292(b) and not contemplating other procedural statutes).

106. For a discussion of other relevant precedent, see *infra* notes 107-16 and accompanying text.

107. 87 U.S. 590, 591 (1875) (holding Judiciary Act of 1867 does not provide jurisdiction over state claims).

108. 211 U.S. 370, 397-99 (1908) (ruling Criminal Appeals Act's language only allows government to appeal questions that statute contemplates).

109. *Murdock*, 87 U.S. at 630-32 (interpreting 28 U.S.C. § 1257 to authorize Supreme Court review of only federal issues within state court decisions).

110. *See, e.g., Keitel*, 211 U.S. at 398-99 (restricting appealable grounds to those listed in statute).

111. *See id.* (concluding only certain challenges explicitly included in statute were reviewable).

112. 556 U.S. 635, 637-38 (2009) (determining § 1447(c) and § 1447(d) did not bar district court's remand order because it was not remand order for lack of subject-matter jurisdiction).

113. 423 U.S. 336, 345-46 (1976) (holding federal district courts may not remand case solely for efficiency reasons).



ject-matter jurisdiction or a removal defect.<sup>114</sup> In *Carlsbad*, the Court held that a district court's remand order made after declining to exercise supplemental jurisdiction did not mean the district court lacked subject-matter jurisdiction for § 1447(c) or § 1447(d) purposes.<sup>115</sup> Further, in *Thermtron*, the Court held § 1447(d) allows appellate review of a court's remand order on grounds § 1447(c) does not articulate.<sup>116</sup>

#### IV. READY TO KNOW WHAT THE SUPREME COURT KNOWS: A NARRATIVE ANALYSIS OF THE SUPREME COURT'S OPINION

The Supreme Court decided to hear *BP P.L.C.* in 2020, ruling solely on the following issue: whether § 1447(d) provides federal appellate courts the power to review any issue in a remand order when a defendant premises removal in part on either § 1442 (the federal officer removal statute) or § 1443 (the civil rights removal statute).<sup>117</sup> Notably, the Court declined to rule on the merits of the environmental claims and instead focused only on the civil procedure question.<sup>118</sup> The Court did not, however, offer a particular reason as to why it declined to rule on either the environmental or § 1442 questions.<sup>119</sup> Moreover, Justice Alito did not participate in the decision, presumably because his ownership of oil company stocks presented a conflict of interest.<sup>120</sup>

114. *Carlsbad*, 556 U.S. at 638-39 (reviewing subject-matter jurisdiction's relationship to remand orders); *Thermtron*, 423 U.S. at 346-52 (analyzing § 1447(d)'s first clause).

115. *Carlsbad*, 556 U.S. at 636 (reversing appellate court's decision and remanding to lower court).

116. *Thermtron*, 423 U.S. at 348-52 (basing holding on lack of evidence in statutory language or congressional history).

117. *BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1537 (2021) (granting certiorari in October 2020).

118. *Id.* at 1536 (stating case's issue "is one of civil procedure").

119. *Id.* (limiting review to § 1447(d) question).

120. *Id.* at 1543 (noting Justice Alito's lack of participation). See generally John Schwartz, *Supreme Court Gives Big Oil a Win in Climate Fight with Cities*, N.Y. TIMES (May 17, 2021), <https://www.nytimes.com/2021/05/17/climate/supreme-court-baltimore-fossil-fuels.html> (observing Justice Alito's ownership of some defendants' stocks). Other critics have argued that Justice Barrett should also have recused herself because of her father's business affiliation with Shell. See *id.* (describing Justice Barrett's connection to oil industry); Bill McKibben, *Amy Coney Barrett Should Recuse Herself from Big Oil's Supreme Court Case*, NEW YORKER (Jan. 13, 2021), <https://www.newyorker.com/news/annals-of-a-warming-planet/amy-coney-barrett-should-recuse-herself-from-big-oils-supreme-court-case> (noting Justice Barrett's father served as attorney for Shell for almost thirty years). Notably, in September 2021, a Wall Street Journal investigation found over 130 federal judges violated ethical and legal rules requiring their recusal due to conflicts of interest. James V. Grimaldi, Coulter Jones & Joe Palazzolo, *131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, WALL ST. J. (Sept. 28, 2021, 9:07

## A. Majority Opinion

The Court disagreed with the Fourth Circuit and held there was jurisdiction to consider all of the defendants' grounds for removal.<sup>121</sup> The primary focus of the Court's analysis concerned the plain meaning of § 1447(d)'s language.<sup>122</sup> The Court then supplemented the analysis by examining comparable precedent and briefly considering Baltimore's policy arguments.<sup>123</sup>

In commencing its analysis, the Court first reviewed the text of § 1447(d).<sup>124</sup> Examining the statutory language, the Court determined it necessary to consider the meaning of the term "ordinarily."<sup>125</sup> Section 1447(d) in its entirety reads:

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.<sup>126</sup>

In dissecting the relevant text from § 1447(d), the Court focused on the word "order" and acknowledged the lack of a qualifier before the term.<sup>127</sup> The Court compared § 1447(d) to § 1446(b)(2)(A), a statutory provision outlining procedural instructions for civil actions removed "solely under" § 1441(a).<sup>128</sup> Section 1446(b)(2)(A) provides the following requirements for removal: "When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in

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AM), <https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421> (detailing 685 lawsuits from 2010 to 2018 in which federal judges failed to recuse themselves due to financial interests).

121. *BP P.L.C.*, 141 S. Ct. at 1543 (rejecting Fourth Circuit's holding).

122. *Id.* at 1537-38 (reviewing § 1447(d)'s ordinary meaning).

123. *Id.* at 1539, 1541-43 (noting most analogous precedent of *Yamaha* and rejecting Baltimore's policy arguments).

124. *Id.* at 1537 (interpreting § 1447(d)'s language as it appears in codified statute).

125. *Id.* (citing *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1479-80 (2021)) (applying textualist approach to interpret statute).

126. 28 U.S.C. § 1447(d) (providing appellate review over certain remand orders).

127. *BP P.L.C.*, 141 S. Ct. at 1537 (explaining meaning of "order" at present time is same as meaning when Congress adopted and amended statute). The Court specifically stated no word qualifies "order" to the effect of changing the term's interpretation. *Id.* (examining statute grammatically).

128. *Id.* at 1538 (noting § 1447(d)'s lack of limiting language compared to § 1446(b)(2)(A)).

or consent to the removal of the action.”<sup>129</sup> According to the Court’s interpretation, § 1447(d) is unlike § 1446(b)(2)(A) because the latter includes the qualifier “solely,” which more clearly limits appellate review of an order.<sup>130</sup> The Court explicitly rejected Baltimore’s argument that the Court should interpret only part of a remand order, ruling instead that any statutory exemption must be given a “fair reading.”<sup>131</sup>

Next, the Court compared the case at issue to its most similar precedent, *Yamaha*, to determine how best to read § 1447(d) in light of any potential ambiguity.<sup>132</sup> In its brief, Baltimore attempted to distinguish the case from *Yamaha* by noting the statute at issue in *Yamaha* includes the word “involves,” which does not appear in § 1447(d).<sup>133</sup> The Court, however, rejected that distinction, holding the dispute in *Yamaha* did not center on the word “involves,” but rather on the word “order.”<sup>134</sup> The Court explained that *BP P.L.C.* is similar to *Yamaha* because it construed the same word, “order.”<sup>135</sup> Although § 1292(b) includes the word “involves,” the Court determined this was irrelevant to the current case because the Court in *Yamaha* neither interpreted that word’s meaning nor considered it in light of the word “order.”<sup>136</sup>

The Court also looked to other cases that Baltimore alleged support a narrow reading of § 1447(d).<sup>137</sup> The Court declined to compare *BP P.L.C.* to either *Murdock* or *Keitel*.<sup>138</sup> Specifically, the Court determined those cases were irrelevant because they contemplated dissimilar statutory contexts.<sup>139</sup> According to the Court’s

129. 28 U.S.C. 1446(b)(2)(A) (outlining requirements for removal of civil actions).

130. *BP P.L.C.*, 141 S. Ct. at 1538 (stressing Court was not persuaded of qualifying phrase’s impact).

131. *Id.* at 1538 (quoting Food Mktg. Inst. V. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019)) (rejecting defendants’ position).

132. *Id.* at 1539 (explaining *Yamaha* opinion resolved § 1447(d) dispute).

133. *Id.* at 1540 (noting Baltimore’s attempt to distinguish *Yamaha* from present case).

134. *Id.* (comparing statutory language Court focused on in *Yamaha* to present case).

135. *BP P.L.C.*, 141 S. Ct. at 1540 (rejecting Baltimore’s reasoning based on word “involves”).

136. *Id.* (reading *Yamaha* as only interpreting term “order”).

137. *Id.* (reviewing supporting cases Baltimore urged Court to consider); Brief for Respondent Mayor & City Council of Baltimore, *BP P.L.C. v. Mayor of Baltimore*, No. 19-1189, 2020 WL 7634393, at \*4-5 (U.S. Dec. 16, 2020) (emphasizing precedent supporting narrow reading of § 1447(d)).

138. *BP P.L.C.*, 141 S. Ct. at 1540-41 (rejecting Baltimore’s claim that *Murdock* and *Keitel* supported narrow review).

139. *Id.* (holding neither *Murdock* nor *Keitel* strengthened Baltimore’s arguments due to differences in circumstances).

reasoning, those cases did not offer assistance in interpreting § 1447(d) and also allowed, rather than prohibited, appellate courts to review those remand orders.<sup>140</sup> The Court also declined to apply the holdings in *Carlsbad* and *Thermtron*, which concerned the provision in § 1447(d) barring appellate review of remand orders.<sup>141</sup> Both cases held this provision only applies to remand orders dealing with issues relating to subject-matter jurisdiction or defects in the order.<sup>142</sup> The Court, however, stated that in those cases, the Court allowed appellate courts to review such orders.<sup>143</sup>

Baltimore also cited a variety of lower court decisions that all held for a narrow review.<sup>144</sup> In doing so, Baltimore further argued Congress impliedly authorized a narrow reading when it amended the statute in 2011 by adding § 1442 as a basis for appellate review.<sup>145</sup> The Court thought it unlikely that Congress implicitly authorized the lower court decisions with the 2011 amendments, reasoning that the statute's plain meaning is contrary to this sort of inference.<sup>146</sup> In particular, the Court was skeptical that Congress paid sufficient attention to district court and circuit court opinions to have authorized this interpretation when it amended the statute in 2011.<sup>147</sup> The Court also rejected Baltimore's position that a broad interpretation could mean defendants might not be required to pay all or a portion of the plaintiff's costs and fees.<sup>148</sup> In rejecting this argument, the Court reasoned that appellate courts often have independent review power over issues related to costs and fees regardless of the scope of review a statute like § 1447(d) provides.<sup>149</sup>

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140. *Id.* at 1541 (distinguishing cases from current case).

141. *Id.* (considering cases dealing with § 1447(d)'s first clause generally barring appellate courts from reviewing remand orders).

142. *Id.* (noting case holdings did not rule for broader scope of review).

143. *BP P.L.C.*, 141 S. Ct. at 1541 (explaining *Carlsbad* and *Thermtron* "permitted" instead of "foreclosed" appellate jurisdiction).

144. *Id.* (indicating Baltimore tried directing Court to lower court consensus when Congress amended § 1447(d) in 2011).

145. *Id.* (explaining Baltimore's argument regarding Congress's implied approval of narrow review at time of amendment).

146. *Id.* (recognizing lower court consensus as "a smattering of . . . opinions" Congress could not possibly endorse).

147. *Id.* (rejecting as unpersuasive Baltimore's argument that Congress knew about lower court opinions and subsequently endorsed consensus's interpretation).

148. *See BP P.L.C.*, 141 S. Ct. at 1541-42 (explaining Baltimore's concern regarding § 1447(c) requiring defendants to pay portion of plaintiff's costs and fees when federal district court remands case to state court).

149. *Id.* at 1542 (stating costs and fees are "independently appealable" and refusing to address uncertified question).

Lastly, the Court considered Baltimore's policy argument that a broad review would delay litigation.<sup>150</sup> The Court took issue with Baltimore's assertion that a narrow review would expedite litigation, countering that a broad review might allow appellate courts to resolve cases swiftly because the § 1442 or § 1443 issue might sometimes be difficult to decide.<sup>151</sup> The Court also reasoned that both § 1447 and the Federal Rules of Civil Procedure would protect against potentially frivolous claims.<sup>152</sup> Specifically, § 1447(c) gives district courts power to make defendants pay certain expenses to plaintiffs if they make a frivolous removal motion, whereas Rule 11 of the Federal Rules of Civil Procedure prohibits lawyers from making frivolous arguments.<sup>153</sup> Ultimately, the Court hesitated to consider policy consequences and limited the scope of its decision to interpreting the statute's meaning; in doing so, the Court avoided overstepping its judicial role and intruding on Congress's power to enact laws.<sup>154</sup>

#### B. Dissent

Justice Sonia Sotomayor was the only dissenter in the case.<sup>155</sup> In her opinion, Justice Sotomayor provided an explanation of removal and a historical summary of § 1447(d).<sup>156</sup> She noted that prior to 2011, when Congress included § 1442 in § 1447(d), all appellate courts hearing the § 1447(d) question only interpreted it to extend appellate review over § 1443 arguments.<sup>157</sup> According to Justice Sotomayor, a broad interpretation of § 1447(d) would allow

150. *Id.* (citing *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012)) (noting "clear statutory directive" supersedes all policy considerations).

151. *Id.* (questioning Baltimore's proposition regarding litigation delays). If a circuit court perceives either a § 1442 or § 1443 question to be difficult and acknowledges other clearer grounds justify removal, the court can proceed efficiently by addressing the straightforward questions. *Id.* (illustrating hypothetical in which broad appellate review might expedite cases).

152. *Id.* at 1542-43 (citing mechanisms available to punish defendants making frivolous claims).

153. *BP P.L.C.*, 141 S. Ct. at 1542-43 (stating Congress has dealt with concern over litigation delays via Rule 11 of Federal Rules of Civil Procedure); FED. R. CIV. P. 11(b), (c) (prohibiting frivolous arguments and granting sanctions when party violates Rule 11(b)).

154. *See BP P.L.C.*, 141 S. Ct. at 1542-43 (differentiating Congress's lawmaking role from judiciary's interpretation role).

155. *Id.* at 1543-47 (Sotomayor, J., dissenting) (providing case's sole dissent).

156. *Id.* at 1543 (explaining removal and remand procedures). Justice Sotomayor noted Congress was worried about parties prolonging litigation with jurisdictional disputes. *Id.* (citing precedent establishing Congress's concern).

157. *Id.* at 1545 (noting eight circuits agreed on narrow interpretation of § 1447(d) before Congress included § 1442 in 2011).

future defendants to assert either § 1442 or § 1443 as bases for removal, even when the statutes would most likely not apply.<sup>158</sup>

Justice Sotomayor conceded that § 1447(d) does not contain clarifying language like other congressional statutes.<sup>159</sup> She laid out the following three interpretations of § 1447(d), in which the statute might: 1) “permit[ ] appellate review of any asserted basis for removal so long as the suit was removed in part pursuant to § 1442 or § 1443”; 2) not permit appellate review at all if the suit was “removed pursuant to multiple grounds”; or 3) only permit appellate review over the § 1442 or § 1443 bases.<sup>160</sup> Justice Sotomayor dismissed both the first option, which the majority adopted, and the second option.<sup>161</sup> She explained the first option allows defendants seeking to get into federal court the opportunity to make a § 1442 or § 1443 argument even when a court would likely reject it.<sup>162</sup> In contrast, the second option would virtually eliminate any appellate review, even when a defendant only asserts either § 1442 or § 1443 grounds for removal.<sup>163</sup> This interpretation contradicts the spirit of § 1447(d) by not allowing any appellate review whatsoever.<sup>164</sup>

Accordingly, Justice Sotomayor embraced the third option in agreeance with Baltimore’s position.<sup>165</sup> She determined this interpretation best fit Congress’s “longstanding policy” of limiting jurisdictional disputes that parties invoke to avoid litigation on a case’s merits.<sup>166</sup> Justice Sotomayor also reasoned that Court precedent indicated courts should construe statutory exceptions — like that in § 1447(d) — narrowly.<sup>167</sup> She disagreed with the majority that Congress was unaware of the appellate court consensus prior to the

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158. *Id.* at 1543 (reasoning that broad review power allows defendants to make § 1442 or § 1443 removal arguments and “lets the exception swallow the rule”).

159. *BP P.L.C.*, 141 S. Ct. at 1544 (admitting § 1447 is unclear in situations in which defendants assert multiple grounds for removal).

160. *Id.* at 1544-45 (outlining three possible interpretations of § 1447(d)).

161. *Id.* at 1544 (rejecting both majority’s interpretation and interpretation rejecting all appellate review).

162. *Id.* (implying broad review power facilitates defendants getting into federal court).

163. *Id.* (stating extremely narrow review is “bizarre outcome”).

164. *BP P.L.C.*, 141 S. Ct. at 1544 (viewing § 1447(d) as Congress’s “express” approval of appellate review over § 1442 or § 1443 claims).

165. *Id.* at 1544-45 (arguing interpretation best accords with Congress’s policy of narrowly construing statutory exceptions and removal procedures).

166. *Id.* at 1544 (quoting *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 228 (2007)) (stating interpretation balances legislative intent with plain meaning).

167. *Id.* (providing general language from existing precedent).

2011 amendment.<sup>168</sup> She also disagreed with the majority's comparison of *Yamaha* to the current case, arguing the language in § 1292(b), the statute at issue in *Yamaha*, was clearer than § 1447(d)'s language.<sup>169</sup> Justice Sotomayor expressed concern that the majority's opinion would encourage defendants to invoke § 1442 in attempting to remove local cases to federal court, even when those defendants are trying to remove their cases pursuant to a different statutory ground.<sup>170</sup>

#### V. ASKING MORE QUESTIONS, NOT GETTING SOME ANSWERS: A CRITICAL ANALYSIS OF THE COURT'S OPINION

One could argue the Supreme Court correctly interpreted § 1447(d)'s plain language meaning.<sup>171</sup> As Justice Gorsuch noted, the statute does not technically limit review to specific parts of a remand order.<sup>172</sup> Additionally, Justice Sotomayor even stated § 1447(d) is not as clear as other statutes.<sup>173</sup> Certain portions of the majority's decision, however, are somewhat misleading and fail to acknowledge fully the decision's potential impact on litigation involving individuals and entities that may not actually be federal officers.<sup>174</sup>

First, the majority made compelling points in its careful reading of § 1447(d).<sup>175</sup> For instance, comparing the language of § 1447(d) to § 1446(b)(2)(A) — the latter of which includes the phrase “solely under” before the word “order” — bolstered the majority's holding by providing an example in which Congress added a qualifying word to limit when cases are removable.<sup>176</sup> Similarly, the majority persuasively distinguished both *Carlsbad* and *Thermtron*

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168. *Id.* at 1545 (noting majority of appellate courts embraced narrow interpretation over approximately fifty years).

169. *BP P.L.C.*, 141 S. Ct. at 1546 (distinguishing § 1292(b) from § 1447(d)).

170. *Id.* (observing defendants only relied on § 1441(a)).

171. For a discussion of the majority's interpretation of § 1447(d), see *supra* notes 124-54 and accompanying text.

172. For a discussion of the majority's interpretation of § 1447(d)'s plain language meaning, see *supra* notes 124-31 and accompanying text.

173. For a discussion of the dissent's concession regarding § 1447(d)'s lack of clear language, see *supra* notes 159-64 and accompanying text.

174. For a discussion of the majority opinion's weaknesses, see *infra* notes 178-89 and accompanying text.

175. For a discussion of the majority opinion's reasoning supporting a broad interpretation of § 1447(d), see *supra* notes 124-54 and accompanying text.

176. For a discussion of the majority's comparison of § 1447(d) to § 1446(b)(2)(A), see *supra* notes 128-31 and accompanying text.

by emphasizing that those cases involved different statutory contexts.<sup>177</sup>

The majority, however, missed an opportunity to strengthen its decision by refusing to address whether energy companies qualify as federal officers under § 1442.<sup>178</sup> The majority expressly ignored the likely fact that the energy companies would not qualify as federal officers under § 1442 as Congress intended.<sup>179</sup> It is unclear why the Court did not certify this question when it took the case, which could result in circuit courts encountering difficulty in the future when making these distinctions.<sup>180</sup> Further, the majority's opinion lacks any reference to legislative history indicating Congress's intent behind the § 1447(d) amendment in 2011.<sup>181</sup> According to a 2011 House report, Congress's reason for amending § 1447(d) was to ensure state courts could not hear cases involving politicians for acts or duties such officers perform.<sup>182</sup> The majority's argument would be more thorough had it accounted for this or similar legislative history.<sup>183</sup>

Instead, the Court attempted to close a door on the § 1442 question by stating the Federal Rules of Civil Procedure allow courts to sanction parties for making frivolous arguments.<sup>184</sup> Although the Court expressly refused to answer the § 1442 question, this statement necessarily raised the question of whether energy companies that contract with the federal government fit the particular type of federal officer § 1442 aims to protect; though the companies were probably not federal officers pursuant to the statute, the dissent correctly noted courts are unlikely to impose sanc-

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177. For a discussion of the Supreme Court's rejection of Baltimore's precedent-based arguments, see *supra* notes 132-47 and accompanying text.

178. For a discussion of the Supreme Court's refusal to rule on whether energy companies qualify as federal officers, see *supra* note 119 and accompanying text.

179. See generally *BP P.L.C. v. Mayor of Baltimore*, 952 F.3d 452, 461-71 (4th Cir. 2020) (holding energy companies do not qualify as federal officers under § 1442).

180. See *BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1542 (2021) (declining to offer extensive explanation on refusal to answer federal officer question).

181. See generally H.R. REP. NO. 112-17, pt. 1, at 3-4 (2011) (offering congressional intent behind amendment of § 1447(d)).

182. *Id.* (expressing desire for public officials to remove cases to federal court to avoid local bias).

183. See generally Theo I. Ogune, *Judges and Statutory Construction: Judicial Zombism or Contextual Activism?*, 30 U. BALT. L.F. 4, 7 (2000) (explaining Supreme Court divide regarding statutory construction approaches and advocating for courts to employ comprehensive statutory approach).

184. For a discussion of the majority's point regarding sanctions, see *supra* notes 152-53 and accompanying text.



tions.<sup>185</sup> Ultimately, the Fourth Circuit viewed § 1442 as inappropriate and would have either dismissed or remanded the case back to the state court anyway.<sup>186</sup>

The majority also seemingly underappreciated the issue the Court addressed.<sup>187</sup> Specifically, the majority opinion repeatedly stated that § 1447(d)'s language is "clear" even though it proved to be the exact opposite; indeed, federal appellate courts themselves could not agree on one interpretation of the post-2011 version of the statute.<sup>188</sup> The majority's opinion also failed to consider the financial inequity between the energy companies and the government entities that members of the Court commented on at oral arguments.<sup>189</sup>

Justice Sotomayor's lone dissent, though somewhat speculative, is bold and commendable for addressing the statute's potential impact on future litigation.<sup>190</sup> Justice Sotomayor also provided valuable insight by applying § 1447(d) prospectively and anticipating future problems the Court will likely need to address.<sup>191</sup> The dissent envisioned how the Court's holding will affect future litigants by reasonably perceiving the possibility that energy companies will be able to get into federal court more easily.<sup>192</sup> Ultimately, Justice

185. See *BP P.L.C.*, 141 S. Ct. at 1546-47 (Sotomayor, J., dissenting) (arguing sanctions will not stop "gamesmanship"). Justice Sotomayor articulated the trouble regarding federal officer claims is that while such claims may be weak, they are not necessarily "meritless" to the point a court will issue sanctions. *Id.* at 1547 (stating threat of sanctions may not be effective).

186. *BP P.L.C. v. Mayor of Baltimore*, 952 F.3d 452, 461-71 (4th Cir. 2020) (ruling against companies' classification as federal officers).

187. See Transcript of Oral Argument, *BP P.L.C. v. Mayor of Baltimore*, No. 19-1189, 2021 WL 197342, at \*37 (U.S. Jan. 19, 2021) (providing Justice Kavanaugh stated ruling was "close call").

188. See *BP P.L.C.*, 141 S. Ct. at 1532, 1537 (noting circuit split as to proper interpretation of § 1447(d)). As Justice Sotomayor's dissent recognized, all circuit courts interpreting § 1447(d) before the 2011 inclusion of § 1442 held for a narrow review. *Id.* at 1545 (Sotomayor, J., dissenting) (disputing majority's characterization of appellate consensus as "smattering of lower court opinions," arguing a "two-thirds" consensus was not "beneath Congress' notice").

189. See Transcript, *supra* note 187 (demonstrating Justice Kavanaugh's understanding of potential for inequitable litigation at oral arguments, which was lacking in majority's analysis of § 1447(d)'s ambiguity).

190. For a discussion of Justice Sotomayor's examination of *BP P.L.C.*'s potential impact, see *supra* note 170 and accompanying text.

191. *BP P.L.C.*, 141 S. Ct. at 1546 (Sotomayor, J., dissenting) (noting premise that appellate jurisdiction will not always "necessarily" mean appellate courts will have jurisdiction over every issue within that order).

192. *Id.* (fearing majority's decision helps defendants who probably do not qualify as federal officers). Justice Sotomayor noted the defendant energy companies dropped their § 1442 argument and only asked the Supreme Court to decide whether removal was proper under § 1441(a), the federal-question jurisdiction

Sotomayor's perspective, especially regarding her claim that sanctions against energy companies would not be sufficient, effectively countered the majority's opinion.<sup>193</sup>

VI. WHAT WE WOULD PAY TO SPEND LESS DAYS WARM ON THE SAND: *BP P.L.C.*'S UNLIKELY BUDDING POLITICAL AND ECONOMIC IMPACT

The Court's decision on a simple civil procedure provision seems brief and unimportant at first sight, but *BP P.L.C.*'s potential impact on the future of climate change litigation and legislation is more than meets the eye.<sup>194</sup> The decision gives elected officials an opportunity to rethink how environmental law intersects with other legal areas, specifically civil procedure.<sup>195</sup> Although *BP P.L.C.* has the potential to serve as notable historical context if the Supreme Court ever rules on the proper venue for climate change lawsuits, the case currently operates in a way that renders imminent climate change litigation confusing, lengthy, and unequal.<sup>196</sup>

For one, the Supreme Court's decision makes climate change litigation even more perplexing for all parties involved.<sup>197</sup> Although energy companies benefit from *BP P.L.C.*, the decision now leaves them wondering what it means to argue frivolously that their companies are federal officers within the meaning of § 1442.<sup>198</sup> Additionally, state and local governments must now ponder how to hold those energy companies accountable without wasting resources.<sup>199</sup>

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statute. *Id.* (stating appellate court did not have authority to review only § 1441(a)).

193. *Id.* at 1543-47 (disagreeing with majority's reasoning and providing insight into potential future problems Congress arguably did not intend).

194. For a discussion of *BP P.L.C.*'s potential impact, see *infra* notes 197-224 and accompanying text.

195. For a discussion of *BP P.L.C.*'s impact on Congress's power to enact both climate change legislation and procedural legislation, see *infra* notes 212-17 and accompanying text.

196. For a discussion of *BP P.L.C.*'s impact on climate change litigation itself, see *infra* notes 197-204 and accompanying text.

197. For a discussion of how *BP P.L.C.* complicates climate change litigation for various parties, see *infra* notes 198-204 and accompanying text.

198. See FED. R. CIV. P. 11(b) (prohibiting frivolous arguments); RESTATEMENT (THIRD) L. GOVERNING LAWS. § 110 cmt. b (2021) (elaborating on meaning of "frivolous advocacy"); Keith A. Call, *Can We Define "Frivolous"?*, 32 UTAH B.J. 48, 50 (2019) (illustrating difficulty of defining "frivolous"); see also Erin Schiller & Jeffrey A. Wertkin, Note, *Frivolous Filings and Vexatious Litigation*, 14 GEO. J. LEGAL ETHICS 909, 910 (2001) (exploring statutes and rules enacted to provide clearer definition of frivolous).

199. See Benjamin T. Sharp, Note, *Stepping into the Breach: State Constitutions as a Vehicle for Advancing Rights-Based Climate Litigation*, 14 DUKE J. CONST. L. & PUB.

Perhaps more significant, though, is that this decision also leaves federal circuit courts confused about their role in deciding climate change disputes.<sup>200</sup> By declining to rule on *BP P.L.C.*'s environmental merits, the Supreme Court makes an already overcast area of the law even hazier for appellate courts attempting to decide whether climate change issues belong in federal or state court.<sup>201</sup> The Court's refusal to rule on the § 1442 question leaves circuit courts wondering when an energy company does qualify as a federal officer under § 1442.<sup>202</sup> Similarly, though the Court seems to imply that some federal officer arguments may be frivolous and therefore sanctionable, the Court's refusal to rule expressly on this issue leaves appellate courts little guidance on how to reach this determination and when to impose sanctions.<sup>203</sup> More broadly, circuit courts are left in the dark regarding how to rule on the many potential facets of a climate change lawsuit, creating the possibility of a deeper circuit split on related procedural issues.<sup>204</sup>

The Court's decision ultimately comes at the average citizen's expense.<sup>205</sup> As Justice Sotomayor implied in her dissent, *BP P.L.C.* perpetuates inequitable litigation by allowing energy companies to

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POL'Y SIDEBAR 39, 44 (2019) (examining how state constitutions might help individuals succeed in climate change litigation); *see also* Reeva Dua, Note, *Driving on Empty: The Fate of Fossil Fuel Companies in Climate Nuisance Litigation*, 4 COLUM. HUM. RTS. L. REV. ONLINE 115, 119 (2019) (examining how individuals and government entities might use "Master Settlement Agreement[s]" instead of "court-determined judgment[s] for monetary damages").

200. For a discussion of *BP P.L.C.*'s impact on appellate courts' decisions moving forward, see *infra* notes 201-04 and accompanying text.

201. *See* *BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1536 (2021) (refusing to address case's environmental merits). *See generally* Noah Star, Case Comment, *State Courts Decide State Torts: Judicial Federalism & the Costs of Climate Change, a Comment on City of Oakland v. BP PLC (9th Cir. 2020)*, 45 HARV. ENVTL. L. REV. 195, 209-15 (2021) (arguing state courts should decide climate change tort suits instead of federal courts). Generally, states base the argument that they should decide climate change disputes on state courts' history of shaping common law tort doctrine. *Id.* at 213 (warning federal courts of potential for imbalance between state and federal governments if defendants successfully remove cases to federal court).

202. *See generally* Michael E. Klenov, Note, *Preemption and Removal: Watson Shuts the Federal Officer Backdoor to the Federal Courthouse, Conceals Familiar Motive*, 86 WASH. U. L. REV. 1455, 1490-91 (2009) (stating Supreme Court precedent regarding federal officer removal statute is complicated and benefits corporations Congress did not seek to protect under federal officer removal statute).

203. *See* *BP P.L.C.*, 141 S. Ct. at 1547 (Sotomayor, J., dissenting) (stating some federal officer arguments may be weak, but do not necessarily warrant sanctions under Federal Rules of Civil Procedure).

204. *See id.* (expressing concern that defendants can "sidestep these restrictions by making near-frivolous arguments for removal under § 1442 or § 1443" and implying courts may need to analyze meaning of "frivolous" argument).

205. For a discussion of the Court's analysis and the concern that its decision prolongs litigation, see *supra* note 170 and accompanying text.

delay litigation.<sup>206</sup> Energy companies are generally wealthier than state and city governments, enjoying a combined total yearly revenue nearly double that of a city like Baltimore.<sup>207</sup> Consequently, these companies can typically expend more resources litigating a jurisdictional dispute, even though those resources would arguably be better spent elsewhere.<sup>208</sup> Even if federal courts sanction energy companies for making frivolous federal officer arguments, it is unclear how severe those sanctions would be and whether they would have any significant effect on companies' litigation strategies.<sup>209</sup> This puts states and cities leading the climate change fight in a difficult position in which they must decide whether the potential monetary rewards justify spending substantial funds on lengthy litigation.<sup>210</sup> Essentially, this case increases the burden on local governments to think of creative, long-term strategies to hold energy companies accountable for their contributions to climate change.<sup>211</sup>

In a similar vein, *BP P.L.C.* pressures states and cities to make an effective appeal to the people this case impacts the most: average taxpaying citizens who are paying for both this litigation and the damage climate change brings.<sup>212</sup> This may prove to be a difficult task, as some scholars have criticized the media for failing to con-

206. See *BP P.L.C.*, 141 S. Ct. at 1547 (stating Baltimore waited three years to litigate environmental claims).

207. Compare Clifford Krauss, *Exxon Mobil and Chevron Report First Quarterly Profits After Several Losses*, N.Y. TIMES, <https://www.nytimes.com/2021/04/30/business/exxon-mobil-chevron-profit.html> (Oct. 29, 2021) (reporting energy companies' first quarterly profits for 2021 reached approximately two billion dollars), with BRANDON M. SCOTT, CITY OF BALT., MARYLAND, PRELIMINARY BUDGET PLAN: FISCAL 2022 4 (2021), [https://bbmr.baltimorecity.gov/sites/default/files/fy22\\_prelim\\_FINAL\\_web.pdf](https://bbmr.baltimorecity.gov/sites/default/files/fy22_prelim_FINAL_web.pdf) (reflecting city's preliminary budget of 3.6 billion dollars for Fiscal Year 2022).

208. Compare Clifford Krauss, *supra* note 207 (demonstrating energy companies' wealth), with BRANDON M. SCOTT, *supra* note 207 (illustrating limited resources in cities like Baltimore).

209. See generally *BP P.L.C.*, 141 S. Ct. at 1546-47 (Sotomayor, J., dissenting) (concluding sanctions are not "failsafe" option, even if they generally deter lawyers from making frivolous arguments); Transcript, *supra* note 187, at \*35-36 (providing Justice Kagan also scrutinized whether argument was actually frivolous).

210. See Geetanjali Ganguly, Joana Setzer & Veerle Heyvaert, Article, *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. LEGAL STUD. 841, 842 (2018) (arguing current climate change lawsuits, in addition to evolving understanding of climate change, will result in positive outcomes despite seeming defeats).

211. See generally Grace Nosek, Article, *Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 733, 802-03 (2018) (outlining how plaintiffs can shift current litigation paradigm to persuade public to support climate change action).

212. See generally Andrew Gage, *Why Hold Fossil Fuel Companies Accountable for Climate Costs?*, W. COAST ENV'T L. (Jan. 11, 2019), <https://wcel.org/blog/why-hold->

textualize fully the ways in which climate change impacts average citizens; considering *BP P.L.C.* did not receive as much media coverage as other Supreme Court cases from the 2020-2021 term, generating public support may prove especially onerous.<sup>213</sup> Environmental activists, though, were quick to note that *BP P.L.C.* was a significant victory for energy companies.<sup>214</sup> Even if environmentalists' subsequent appeals to enact harsher federal climate change legislation are unsuccessful, public pressure for additional federal legislation has substantially increased over the past few years.<sup>215</sup> This case puts more pressure on Congress to enact comparable federal climate change law as well as related laws to deter energy companies from striving to litigate in federal court.<sup>216</sup> If Congress strengthens federal climate change law, the Supreme Court might finally address the broader venue question, which, depending on its resolution, might further impact state climate change law by rendering it virtually obsolete.<sup>217</sup>

Ultimately, the Supreme Court's refusal to rule on whether state or federal court is the appropriate venue for climate change litigation in *BP P.L.C.* signifies the Court's general reluctance to

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fossil-fuel-companies-accountable-climate-costs (claiming taxpayers bear brunt of climate costs).

213. See Adam Liptak & Alicia Parlapiano, *Tracking the Major Supreme Court Decisions This Term*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/06/01/us/major-supreme-court-cases-2021.html> (July 1, 2021) (listing major Supreme Court cases from 2020-2021 term); Frederick Hewett, *Media Coverage of Climate Change Is Improving. But That Alone Won't Stamp Out Disinformation*, WBUR (July 2, 2021), <https://www.wbur.org/cognoscenti/2021/07/02/heat-political-bias-in-climate-coverage-frederick-hewett> (encouraging media outlets to cover climate change more frequently).

214. See Jason Mark, *Supreme Court Delivers a Victory to Big Oil*, SIERRA CLUB (May 20, 2021), <https://www.sierraclub.org/sierra/supreme-court-delivers-victory-big-oil> (claiming *BP P.L.C.* decision benefits energy companies).

215. See generally Alex Samuels & Mackenzie Wilkes, *Americans Want the Government to Act on Climate Change. What's the Hold-Up?*, FIVETHIRTYEIGHT (Oct. 8, 2021, 6:00 AM), <https://fivethirtyeight.com/features/americans-want-the-government-to-act-on-climate-change-whats-the-hold-up/> (explaining pressure on Congress to keep climate-related provisions in pending infrastructure bill).

216. See generally Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 423-24 (2011) (observing complex relationships between government branches and effect on developing richer law). Justice Sotomayor also noted Congress could amend § 1442 after the Court's decision in *BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1547 (2021) (Sotomayor, J., dissenting) (observing Congress's ability to clarify statutory language).

217. See generally Karen C. Sokol, *Seeking (Some) Climate Justice in State Tort Law*, 95 WASH. L. REV. 1383, 1438 (2020) (arguing possible federalization of state climate change law threatens future effectiveness).

decide such a politically charged issue.<sup>218</sup> The Court's opinion in *BP P.L.C.* sends a subtle "SOS" signal to Congress for assistance in adjudicating these litigation battles, and this call for help will likely only intensify as time progresses.<sup>219</sup>

The Supreme Court's decision in *BP P.L.C.* — though just one of "civil procedure" — presents an opportunity for Congress to fight for the average taxpaying citizen, enact stricter federal climate change law, and clarify the proper venue for climate change claims.<sup>220</sup> In turn, however, the future of climate change litigation ultimately comes down to those same taxpayers.<sup>221</sup> Challenging the threat inequitable litigation presents for future climate change cases will only occur when those constituents persuade Congress to review all legal mechanisms, including the civil procedure statutes that lead to decisions similar to this case.<sup>222</sup> *BP P.L.C.* serves as a reminder to Congress of its power and responsibility to enact and revise civil procedure statutes that may not seem consequential to its policy goals at the outset.<sup>223</sup> Finally, this case encourages Congress to consider how its failure to create clear, stringent climate change legislation and corresponding procedural laws costs taxpaying citizens much more than it realizes.<sup>224</sup>

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218. For a discussion of the environmental venue question, see *supra* notes 54-77 and accompanying text.

219. For a discussion of how *BP P.L.C.* necessarily implicates Congress, see *supra* notes 216-17 and accompanying text.

220. For a discussion of *BP P.L.C.*'s potential impact on federal climate change legislation, see *supra* notes 216-17 and accompanying text.

221. For a discussion of *BP P.L.C.*'s indirect impact on taxpayers, see *supra* note 205-11 and accompanying text.

222. For a discussion of *BP P.L.C.*'s subsequent impact on taxpayers, see *supra* notes 205-11 and accompanying text.

223. For a discussion of Congress's power to enact civil procedure statutes, see *supra* notes 216-17 and accompanying text.

224. For a discussion of *BP P.L.C.*'s impact on Congress as it relates to the broader electorate, see *supra* notes 212-15 and accompanying text.

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