UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LEON M. HEREFORD, Administrator of the Estate of Countess Galloway, deceased, Appellee, v. BROOMALL OPERATING COMPANY LP, doing business as Broomall Rehabilitation and Nursing Center, et al., Appellants, and JOHN DOES, 1-5, Fictitious Defendant(s), Appellee.	No. 22-7005 (LEAD CASE) Consolidated with Nos. 22-7006, 22-7007, and 22-7008

APPELLEES' MOTION TO DISMISS

Plaintiffs-Appellees Leon M. Hereford, Michael P. Lynch, Rochelle M. Johnson, and Patrick M. Smith hereby move to dismiss these consolidated appeals for lack of jurisdiction.

Below, the United States District Court for the Eastern District of Pennsylvania resolved two questions: whether the doctrine of complete

preemption provides a basis for federal-question jurisdiction over four cases raising exclusively state-law claims and whether the amendment of plaintiffs' complaints to add Pennsylvania-resident defendants constituted fraudulent joinder. The district court answered no to both questions, denied other pending motions as moot, and ordered that the cases be remanded to state court. Under 28 U.S.C. § 1447(d), that order is "not reviewable on appeal or otherwise." Thus, there is nothing for this Court to review.

Appellants' notice of appeal invokes the collateral order doctrine and Public Readiness and the Emergency Preparedness (PREP) Act as bases for jurisdiction. Neither of those exceptions to the finality requirement of 28 U.S.C. § 1291 overcomes the review bar imposed by section 1447(d). And neither exception applies here. Accordingly, the Court should dismiss the appeal in its entirety.

BACKGROUND

Plaintiff-Appellees are the survivors of Countess Galloway, John J. Lynch, Sr., Dorothy P. Johnson, and James A. Smith, Jr.—four of the forty-three residents at Broomall Rehabilitation and Nursing Center in Broomall, Pennsylvania, who died of COVID-19 between March and May

2020. *See* Hereford Compl. (Dist.Ct.Dkt. 1-1) ¶¶ 8, 22, 37; Lynch Compl. (Dist.Ct.Dkt. 1-1) ¶¶ 8, 22, 37; Johnson Compl. (Dist.Ct.Dkt.1-1) ¶¶ 8, 22, 37; Smith Compl. (Dist.Ct.Dkt.1-1) ¶¶ 8, 22, 37. They filed separate actions in the Delaware County, Pennsylvania, Court of Common Pleas, alleging that their loved ones died as a result of Broomall's negligent infection control policies and practices, including its failures to isolate residents who demonstrated symptoms of and/or tested positive for COVID-19, to implement social distancing policies, to undertake contact tracing, to provide staff and residents with appropriate personal protective equipment, and to train its employees as to infection prevention and control policies. *See, e.g.*, Hereford Compl. ¶¶ 45, 50, 55, 65, 70. They alleged that these failures, accompanied by systemic understaffing at Broomall, led to the deaths of the four residents. Hereford Compl. ¶¶ 40–42, 50; Lynch Compl. ¶¶ 40–42, 50; Johnson Compl. ¶¶ 40–42, 50; Smith Compl. (Dist.Ct.Dkt.1-1) ¶¶ 40–42, 50. Their complaints included claims against various Broomall-affiliated entities and individuals (collectively, Broomall) for negligence and corporate negligence pursuant to Pennsylvania's wrongful death statute, 42 Pa.

C.S. § 8301, and its survival statute, 42 Pa. C.S. § 8302. *See, e.g.*, Hereford Compl. ¶¶ 44–102.

"Following a strategy apparently being followed by nursing homes across the country," Broomall removed all four actions to the United States District Court for the Eastern District of Pennsylvania. Dec. 9, 2021 Memorandum Opinion (Ex. A) (hereafter, Opinion) at 1–2. Broomall argued that the district court had subject-matter jurisdiction over the state-law claims both on diversity grounds pursuant to 28 U.S.C. § 1332(a)(1), and under the federal-question jurisdiction statute, 28 U.S.C. § 1331, on the theory that the PREP Act, 42 U.S.C. § 247d-6d, completely preempts the Pennsylvania-law claims. *See*, *e.g.*, Hereford Dist.Ct.Dkt.1 at ¶¶ 5–6. Shortly after removal, Broomall filed motions to dismiss in each case, arguing that the claims were barred by the PREP Act's immunity provision, 42 U.S.C. § 247d-6d(a), and a Pennsylvania executive order. *See*, *e.g.*, Hereford Dist.Ct.Dkt. 7 at 1. Each plaintiff then filed an amended complaint, adding three new defendants—two of whom are Pennsylvania residents. *See*, *e.g.*, Hereford Dist.Ct.Dkt.11. The district court dismissed the then-pending motions to dismiss as moot in light of the amended complaint. *See*, *e.g.*, Hereford Dist.Ct.Dkt.12.

Broomall filed amended notices of removal invoking the same two jurisdictional statutes, along with motions to strike the amended complaints, invoking the fraudulent joinder doctrine. *See*, *e.g.*, Hereford Dist.Ct.Dkt. 15 (amended notice of removal); Dist.Ct.Dkt.16-1 (motion to strike). It also filed new motions to dismiss, raising the same merits arguments as in its earlier motions. *See*, *e.g.*, Hereford Dist.Ct.Dkt.18-1. Days later, each plaintiff filed a motion to remand for lack of subject-matter jurisdiction. *See*, *e.g.*, Hereford Dist.Ct.Dkt.23. While the motions to remand, motions to strike, and renewed motions to dismiss all remained pending, the cases were consolidated for pretrial purposes. *See* Hereford Dist.Ct.Dkt.40.

On November 17, 2021, the district court held oral argument "limited to issues related to [its] jurisdiction." Hereford Dist.Ct.Dkt.43. Three weeks later, the court issued a memorandum opinion "conclud[ing] that remand to state court is required." Opinion at 2. As to Broomall's assertion of federal-question jurisdiction, the court stated that the Third Circuit's decision in *Estate of Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393 (3d Cir. 2021), *reh'g en banc denied* (Feb. 7, 2022), governed.

Like these cases, *Maglioli* involved an attempt by a nursing home to remove state-law claims based on negligent infection control measures to federal court on the theory that the PREP Act completely preempts those claims.[1] The Third Circuit rejected that argument, holding that that statute only completely preempts claims that could have been brought "under the PREP Act's cause of action for willful misconduct." *Id.* at 410. Because the claims at issue were for negligence, not willful misconduct, the Third Circuit held that they were not completely preempted and declined to address whether subsection (a) of the PREP Act preempted the negligence claims "under ordinary preemption rules." *Id.* at 410–11, 412. *See also Saldana v. Glenhaven Healthcare LLC*, 2022 WL 518989, at *5 (9th Cir. Feb. 22, 2022) (holding that PREP Act does not completely preempt state-law claims).

Applying *Maglioli*, the district court here explained that none "of the plaintiffs pleaded that Broomall acted 'knowingly without legal or factual justification' and with an intent 'to achieve a wrongful purpose,'"

[1] Unlike Broomall, the *Maglioli* defendants had invoked the federal-officer removal statute, which gave the Third Circuit jurisdiction to review the district court's remand order. *See* 16 F.4th at 402–03 (citing *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1538 (2021)).

as would be necessary for their claims to be completely preempted by the PREP Act. Opinion at 5–6. Like the Third Circuit, the district court did *not* address whether the PREP Act bars the plaintiffs' claims under ordinary preemption principles, which would be a merits question, not a jurisdictional question.

The court next turned to Broomall's argument that removal was proper based on diversity jurisdiction. Applying the four factors identified in *Hensgens v. Deere & Co.*, 833 F.2d 1179 (5th Cir. 1987), the district court held that the plaintiffs' amendments of their complaints to include Pennsylvania-resident defendants was appropriate and did not constitute "fraudulent joinder." Opinion at 7–13. The court concluded: "Defendants' Motions to Strike the Amended Complaint will be denied, and Plaintiffs' Motions to Remand will be granted. An appropriate order follows." *Id.* at 13.

The court entered an order stating that the motions to strike were denied, the motions to remand were granted, and "All other pending motions are denied as moot." Hereford Dist.Ct.Dkt.56. (Order) (Ex. B). Broomall then appealed the order of the Pennsylvania district court to this Court.

ARGUMENT

I. Section 1447(d) bars review of the district court's order.

Where a district court holds that it lacks subject-matter jurisdiction based on the absence of a federal question or complete diversity of the parties, that decision "is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). Any other orders of the district court are only reviewable to the extent they are "separable" and precede "in logic and in fact" the district court's jurisdictional finding. *City of Waco v. U.S. Fidelity & Guar. Co.*, 293 U.S. 140, 143 (1934); *see also Kimbro v. Velten*, 30 F.3d 1501, 1503 (D.C. Cir. 1994). Under these well-established principles, section 1447(d) bars this Court's review of the December 9 order, in its entirety.

A. Section 1447(d) bars review of the district court's remand decision.

Section 1447(d) "reflects Congress's longstanding 'policy of not permitting interruption of the litigation of the merits of a removed case by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.' Appellate courts must take that jurisdictional prescription seriously, however pressing the merits of the appeal might seem." *Powerex Corp. v. Reliant Energy Services Inc.*, 551

U.S. 224, 238 (2007) (internal citation omitted); *see Kircher v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006) (stating "we have relentlessly repeated that any remand order issued on the grounds specified in § 1447(c) is immunized from all forms of appellate review, whether or not that order might be deemed erroneous by an appellate court" (cleaned up)); *see also Republic of Venezuela v. Philip Morris Inc.*, 287 F.3d 192, 196–97 (D.C. Cir. 2002) (holding that § 1447(d) includes no "extraordinary circumstances" exception).

Here, the district court's remand is unquestionably within the scope of the section 1447(d) bar on appellate review. The sole bases on which Broomall claimed federal jurisdiction were diversity jurisdiction and federal-question jurisdiction—neither of which appears in any exception to section 1447(d). *See* Opinion at 2. The district court's determination that it lacked jurisdiction on these theories is thus unreviewable. *See*, *e.g.*, *Republic of Venezuela*, 287 F.3d at 196 (dismissing appeal of remand order based on lack of federal-question jurisdiction); *DeMartini v. DeMartini*, 964 F.3d 813, 820–21 (9th Cir. 2020) (dismissing appeal of remand order based on lack of complete diversity).

A remand decision based on a lack of complete preemption is unreviewable under section 1447(d), although it necessarily involves consideration of a substantive statute. *See*, *e.g.*, *Carlson v. Arrowhead Concrete Works, Inc.*, 445 F.3d 1046, 1051–52 (8th Cir. 2006) (dismissing appeal from remand order finding claims not completely preempted); *Gonzalez-Garcia v. Williamson Dickie Mfg. Co.*, 99 F.3d 490, 492 (1st Cir. 1996) (same); *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1181–82 (9th Cir. 1989) (same).

The same goes for a fraudulent joinder analysis, which also generally includes a discussion of the merits of the underlying claims against non-diverse defendants. *See Saginaw Housing Comm'n v. Bannum, Inc.*, 576 F.3d 620, 625 (6th Cir. 2009) (finding remand based on lack of fraudulent joinder unreviewable); *Nerad v. AstraZeneca Pharmaceuticals, Inc.*, 203 F. App'x 911, 913–14 (10th Cir. 2006) (same); *Victor v. Grand Casino-Coushatta*, 359 F.3d 782, 784–85 (5th Cir. 2004) (same); *Filla v. Norfolk Southern Ry. Co.*, 336 F.3d 806, 811 (8th Cir. 2003) (same); *Hernandez v. Seminole Cty., Fla.*, 334 F.3d 1233, 1237 (11th Cir. 2003) (same).

B. Section 1447(d) bars review of all other aspects of the district court's order.

Perhaps because of the bar imposed by section 1447(d), in its Statement of Issues, Broomall does not purport to seek review of the remand order per se. Rather, it purports to seek review of (1) the district court's denial of its motions to strike the amended complaint and (2) the district court's denial of its motions to dismiss as moot in light of its remand for lack of subject-matter jurisdiction. Because those denials are not separable from the unreviewable remand order, the 1447(d) bar extends to review of those aspects of the order as well.

As this Court has recognized, whether section 1447(d) bars "appellate review of an order made in conjunction with a remand to state court" is governed by a test derived from the Supreme Court's decision in *City of Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140 (1934).[2] *Kimbro*, 30 F.3d at 1503. In *Waco*, a Texas plaintiff sued the City of Waco in state court under state law; the city filed a cross-complaint against a

[2] *Waco* preceded enactment of section 1447(d) and its "continued vitality" has been called into question. *Kircher*, 547 U.S. at 644 n.13; *see also DeMartini*, 964 F.3d at 821 n.3; *In re C & M Properties, LLC*, 563 F.3d 1156, 1164 (10th Cir. 2009) (Gorsuch, J). The Court need not resolve that question here because this appeal must be dismissed even under *Waco*'s standard.

non-Texas entity and removed the case to federal court. 293 U.S at 141. In a single order, the district court dismissed the cross-complaint, and then, given that there was no diversity of citizenship between the remaining parties, remanded the case to state court. *Id.* at 142. Considering whether the city properly appealed the dismissal of the cross-complaint, the Supreme Court held that the city could appeal, even though the dismissal was embodied in the same order as the unreviewable remand. The Court reasoned that "in logic and in fact the decree of dismissal preceded that of remand" and "if not reversed or set aside, is conclusive upon the petitioner." *Id.* at 143.

"Courts have continued to rely on the *Waco* decision to identify which orders are sufficiently distinct from the order of [remand] to be entitled to appellate review, assuming that either a final judgment or an authorized interlocutory appeal is present." *Good v. Voest-Alpine-Industries, Inc.*, 398 F.3d 918, 923 (7th Cir. 2005); *see also, e.g., DeMartini*, 964 F.3d at 822; *Fontenot v. Watson Pharms., Inc.*, 718 F.3d 518, 521–22 (5th Cir. 2013); *E.D. ex rel. Darcy v. Pfizer, Inc.*, 722 F.3d 574, 582–83 (4th Cir. 2013); *Hill v. Vanderbilt Capital Advisors, LLC*, 702 F.3d 1220, 1226–27 (10th Cir. 2013). This Court did so in *Kimbro*,

holding that a district court's rejection of a Westfall Act substitution of the United States for an individual federal employee defendant was reviewable, although the district court remanded the action to state court in the same order. 30 F.3d at 1502–03.[3] There, citing decisions of the Third and Fifth Circuits, the Court found the Westfall Act issue "logically precedes the question of remand," and "hinged upon appealable issues of substantive law and is thus separable from the unreviewable jurisdictional question of the proper forum." *Id.* at 1503. *See also Denizen Dev., L.L.C. v. Saxon*, 850 F. App'x 7, 8 (D.C. Cir. 2021) (citing *Agostini v. Piper Aircraft Corp.*, 729 F.3d 350, 355 (3d Cir. 2013), for proposition that 1447(d) bars review where "it is impossible to disaggregate the order [on appeal] from the remand order itself").

Here, neither the denial of Broomall's motions to strike nor the denial of its motions to dismiss meet the *Waco* standard. Broomall's motions to strike were based on the same fraudulent joinder arguments made in its oppositions to the motions to remand. *See, e.g.*, Hereford

[3] The Supreme Court subsequently held that section 1447(d) does not apply to remands of cases where the Attorney General has made a Westfall Act certification, in light of the unique "aspects of the Westfall Act. *See Osborn v. Haley*, 549 U.S. 225, 243–44 (2007).

Dist.Ct.Dkt.16 at 5–16 (motion to strike); Hereford Dist.Ct.Dkt.34 at 4–13 (opposition to motion to remand). That the issue was raised in a motion to strike *and* in an opposition to remand is irrelevant; the Tenth Circuit has found 1447(d) bars appellate review in these precise circumstances. *See Elite Oil Field Enters. v. Reed*, 979 F.3d 857, 863–65 (10th Cir. 2020) (dismissing appeal from denial of motion to strike or dismiss complaint based on fraudulent joinder as barred by 1447(d)). The district court did not separately address the fraudulent joinder argument in support of the motion to strike and in opposition to remand, but rather analyzed (and rejected) the argument once. Opinion at 6–13. The court's analysis of this issue was in no way antecedent to or "separable from the unreviewable jurisdictional question"; to the contrary, it *is* "the unreviewable jurisdictional question." *Kimbro*, 30 F.3d at 1503.

The one-sentence denial of all pending motions as moot, including the motions to dismiss, also fails to meet the *Waco* test. The denial of a motion "as moot," Order at 2, in light of a decision to remand necessarily comes after, not before, the decision to remand, because "[a]ny order remanding a matter to state court for lack of subject matter jurisdiction necessarily denies all other pending motions." *Dahiya v. Talmidge Int'l,*

Ltd., 371 F.3d 207, 210 (5th Cir. 2004). The denial of the motions to dismiss was thus "intimately enmeshed with and unseverable from the remand order," as it was *required as a consequence of the decision to remand*, in which the district court concluded that it lacked jurisdiction. *In re Blackwater Security Consulting, LLC*, 460 F.3d 576, 589–90 (4th Cir. 2006) (dismissing appeal pursuant to §1447(d) where district court denied motion to dismiss as moot after finding it lacked jurisdiction); *see also Whitman v. Raley's Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989) (dismissing similar appeal and stating "if the court rules that the claim is not 'completely preempted,' the federal court lacks jurisdiction to rule on the substantive preemption defense").

II. Neither the collateral order doctrine nor the PREP Act provides appellate jurisdiction.

In its notices of appeal, Broomall invoked both the collateral order doctrine and subsection (e)(10) of the PREP Act, 42 U.S.C. § 247d-6d(e)(10), as grounds for appellate jurisdiction. Neither provides a basis for jurisdiction for this appeal. First, neither the collateral order doctrine nor the PREP Act is an exception to section 1447(d). As several courts of appeals have recognized, "the inquiries about separableness (whether § 1447(d) bars review) and collateralness (whether § 1291 bars review)'

must not be collapsed into one inquiry." *Porter v. Times Grp.*, 902 F.3d 510, 513–14 (5th Cir. 2018) (quoting *Doleac ex rel. Doleac v. Michalson*, 264 F.3d 472, 485 (5th Cir. 2001)); *see also Blackwater*, 460 F.3d at 594 (holding order on review must both "overcome the hurdle of § 1447(d)" and "satisf[y]" "the doctrine of finality"); *W.R. Huff Asset Mgmt. Co. v. Kohlberg, Kravis, Roberts & Co., L.P.*, 566 F.3d 979, 984 (11th Cir. 2009) (similar); *Good*, 398 F.3d at 918 (similar); *Stevens v. Brink's Home Sec., Inc.*, 378 F.3d 944, 946–47 (9th Cir. 2004) (similar); *Carr v. Am. Red Cross*, 17 F.3d 671, 675 (3d Cir. 1994) (similar); *cf. Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711–12 (1996) (analyzing applicability of section 1447(d) and finality separately); *Barksdale v. Wash. Metro. Area Trans. Auth.*, 512 F.3d 712, 714–15 (D.C. Cir. 2008) (same). Where they apply, the collateral order doctrine and PREP Act subsection (e)(10) go to finality only, not to the 1447(d) bar. Moreover, even as to finality, neither the collateral order doctrine nor subsection (e)(10) applies to the orders on appeal.

A. The collateral order doctrine does not provide a basis for jurisdiction.

The collateral order "doctrine is not an independent basis for jurisdiction but rather a 'practical construction' of the word 'final' in 28

U.S.C. § 1291." *Sundel v. United States*, 985 F.3d 1029, 1032 (D.C. Cir. 2021) (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 51–42 (1995)). As every court of appeals to address the issue has concluded, the doctrine does not provide an exception to the separate jurisdictional bar posed by section 1447(d). *See Meeks v. Swift Transp., Inc.,* 398 F. App'x 980, 983 (5th Cir. 2010); *Moody v. Great Western Ry. Co.*, 536 F.3d 1158, 1165 (10th Cir. 2008); *Carlson*, 445 F.3d at 1054; *In re WTC Disaster Site*, 414 F.3d 352, 368–69 (2d Cir. 2005); *Good*, 398 F.3d at 926–27. A contrary holding "would virtually eviscerate § 1447(d) by allowing review of essentially any remand order if it were framed by the appealing party as a collateral order." *Carlson*, 445 F.3d at 1054.

In addition to not overriding section 1447(d), the collateral order doctrine does not apply here to either the denial of the motion to strike or the denial of the motion to dismiss as moot. The "small class of collateral rulings" that are considered final under that doctrine "includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (cleaned up). But in this case, "[i]t

is only the forum designation that is conclusive." *Kircher*, 547 U.S. at 647. Even if the district court had commented on other issues in the course of making its jurisdictional determination, such commentary is "by definition" not binding upon the state courts on remand. *In re C & M Properties, L.L.C.*, 563 F.3d 1156, 1166 (10th Cir. 2009) (Gorsuch, J.); *see also Kircher*, 547 U.S. at 647 ("While the state court cannot review the decision to remand in an appellate way, it is perfectly free to reject the remanding court's reasoning."). As such, nothing in the district court's order prevents Broomall "from raising the affirmative defense of preemption or from bringing a motion to dismiss in the state court proceedings below," either on the basis that ordinary preemption under the PREP Act applies, or on the basis that the Pennsylvania defendants are not proper parties to the suit. *Carlson*, 445 F.3d at 1053; *see also Lindner v. Union Pac. Ry. Co.*, 762 F.3d 568, 572 (7th Cir. 2014). And if Broomall is dissatisfied with the Pennsylvania trial court's rulings on those issues, it may seek review from the Pennsylvania appellate courts and, as to the PREP Act argument, ultimately the Supreme Court.

B. Subsection (e)(10) of the PREP Act does not provide jurisdiction.

Titled "Interlocutory appeal," 42 U.S.C. § 247d-6d(e)(10), grants this Court jurisdiction over "interlocutory appeal[s]" from otherwise non-final denials of certain motions to dismiss and for summary judgment. Like the collateral order doctrine, subsection (e)(10) relates only to the finality requirement otherwise imposed by 28 U.S.C. § 1291. It does not allow this Court to review decisions that section 1447(d) makes "not reviewable on appeal or otherwise." And even as to finality, it does not apply at all to the district court order at issue.

1. Background on the PREP Act

Initially enacted in 2005 "[t]o encourage the expeditious development and deployment of medical countermeasures during a public health emergency, the [PREP Act] authorizes the Secretary of Health and Human Services (HHS) to limit legal liability for losses relating to the administration of medical countermeasures such as diagnostics, treatments, and vaccines." Cong. Res. Serv., *The PREP Act and COVID-19: Limiting Liability for Medical Countermeasures* 1 (updated Jan. 13, 2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10443.

The Secretary triggers the PREP Act by issuing a declaration determining that a public health emergency exists and "recommending" the "manufacture, testing, development, distribution, administration, or use of one or more covered countermeasures." 42 U.S.C. § 247d-6d(b)(1); *see Maglioli*, 16 F.4th at 400–01. The Secretary may designate only certain drugs, biological products, and devices authorized or approved for use by the Food and Drug Administration or the National Institute for Occupational Safety and Health as "covered countermeasures." 42 U.S.C. § 247d-6d(i)(1)(A)–(D).

Subsection (a) of the PREP Act provides "covered persons" with immunity from liability under state or federal law for "any claim for loss that has a causal relationship with the administration to or use by an individual of a [designated] covered countermeasure." *Id.* §§ 247d-6d(a)(1), (a)(2)(B). Subsection (d) creates an exception to that immunity for claims relating to "willful misconduct" and creates an "exclusive Federal cause of action" for such claims. *Id.* § 247d-6d(d)(1). Subsection (e), entitled "Procedures for Suit," contains ten numbered paragraphs. Paragraphs 1 through 9 expressly apply to "action[s] under subsection (d)." *Id.* § 247d-6d(e)(1)–(9). Those paragraphs set forth pleading

requirements, limitations on discovery, and the specification that "[a]ny action under subsection (d) shall be filed and maintained only in the United States District Court for the District of Columbia." *Id.* § 247d-6d(e)(1). Paragraph 5 provides that, in such an action, a three-judge panel of that court shall consider motions to dismiss and motions for summary judgment, and paragraph 6 provides for a stay of discovery during the pendency of a motion to dismiss or an interlocutory appeal from the denial of such a motion. *Id.* § 247d-6d(e)(5), (6). Paragraph 10, entitled "Interlocutory appeal," states:

> The United States Court of Appeals for the District of Columbia Circuit shall have jurisdiction of an interlocutory appeal by a covered person taken within 30 days of an order denying a motion to dismiss or a motion for summary judgment based on an assertion of the immunity from suit conferred by subsection (a) or based on an assertion of the exclusion under subsection (c)(5).

Id. § 247d-6d(e)(10).

2. Subsection (e)(10) addresses finality, not the section 1447(d) bar.

Where it applies, subsection (e)(10) allows this Court to review denials of motions to dismiss and of motions for summary judgment despite their lack of finality. *Cf. Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 (1988) (holding that a denial of a

motion to dismiss is not appealable under § 1291); *Johnson v. Greater Se. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1270 (D.C. Cir. 1991) (noting that "a denial of a motion for summary judgment is not an appealable order"). In such cases, defendants need not invoke 28 U.S.C. § 1292(b) to appeal, as would ordinarily be required.[4] But subsection (e)(10) of the PREP Act says nothing about section 1447(d) or remand orders. That silence means that it does *not* create an exception to section 1447(d).

"Congress has repeatedly demonstrated its readiness to exempt particular classes of remand orders from § 1447(d) when it wishes." *Powerex*, 551 U.S. at 237. Accordingly, the Supreme Court has repeatedly held it will not construe a statute as creating an exception to the section 1447(d) bar absent a "clear statutory command," relying on the "assum[ption] that Congress is aware of the universality of the practice

[4] Appellees also maintain that subsection (e)(10) applies only to appeals from decisions of a three-judge panel of the District Court for the District of Columbia convened to hear claims brought pursuant to the exclusive cause of action created by section (d) of the PREP Act, 42 U.S.C. § 247d-6d(d), (e)(1), (e)(5), not to appeals from district courts outside the District of Columbia addressing claims under state law or other statutes. Resolution of that question, though, which is pending before this Court in *Cannon v. Watermark Retirement Communities*, No. 21-7067, and *Beaty v. Fair Acres Geriatric Center*, No. 21-7096 (both scheduled to be argued on April 28, 2022), is not necessary here, given the section 1447(d) bar.

of denying appellate review of remand orders." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995) (cleaned up); *see also Powerex*, 551 U.S. at 237; *Kircher*, 547 U.S. at 641 n. 8. Regardless of policy arguments that could be made allowing for appeals from certain kinds of remands, courts may "not ignore a clear jurisdictional statute," section 1447(d), "in reliance upon supposition of what Congress *really* wanted." *Powerex*, 551 U.S. at 237.

Applying this principle, the Supreme Court has refused to find implied carveouts from section 1447(d) under numerous statutes, including the bankruptcy removal statute, *Things Remembered*, 516 U.S. at 128–29, the Foreign Sovereign Immunities Act (FSIA), *Powerex*, 551 U.S. at 237, and the Securities Litigation Uniform Standards Act of 1998 (SLUSA), *Kircher*, 547 U.S. at 641. *See also Preston v. Nagel*, 857 F.3d 1382, 1385–87 (Fed. Cir. 2017) (holding that the removal provision of the America Invents Act does not contain implied exemption from § 1447(d)); *Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 625 (8th Cir. 1997) (holding that removal under Convention on the Recognition and Enforcement of Foreign Arbitral Awards is not an implied exception to § 1447(d)).

The argument for finding an implied exception to section 1447(d) in the interlocutory appeal provision of the PREP Act is even weaker than it is in those statutes. Whereas the bankruptcy statutes, FSIA, and SLUSA include express removal provisions, the PREP Act does not. And based on its plain text, the PREP Act's subsection (e)(10) has relevance only where a party files a motion to dismiss or for summary judgment. Therefore, even if that provision did contain a carveout from section 1447(d) where a district court has denied a dispositive motion as moot based on the court's lack of jurisdiction, that carveout would *not* apply if a district court remanded an action to state court before a removing defendant placed a dispositive motion on the docket. No rationale supports appellate review of a remand order in the former case and not the latter. To the contrary, such a distinction would simply encourage every removing defendant to file a perfunctory motion to dismiss alongside their notice of removal to evade the 1447(d) bar. Nothing in the PREP Act supports such gamesmanship and inefficiency. *Cf. Ray v. Am. Nat'l Red Cross*, 921 F.2d 324, 326 (D.C. Cir. 1990) (holding 28 U.S.C. § 1292(b) could not be used for "the circumvention of 28 U.S.C. § 1447(d)").

3. Subsection (e)(10) does not apply to the orders on appeal.

Like the collateral order doctrine, subsection (e)(10) does not apply to the orders on appeal—even to provide an exception from the finality requirement of 28 U.S.C. § 1291. First, the statute does not provide for interlocutory appeals to this Court from denials of motions to strike, and thus it cannot provide a basis for this Court's review of that non-final order. *Cf. Bombardier Corp. v. Nat'l R.R. Passenger Corp.*, 333 F.3d 250, 254 (D.C. Cir. 2003) (holding that omission of denials of motions to dismiss from Federal Arbitration Act's list of orders subject to interlocutory appeal meant such denials could not be appealed pursuant to that provision). As to the motion to dismiss, the district court's denial was a housekeeping matter given its preceding order remanding the action to state court due to a lack of jurisdiction. *See Int'l Primate Protection League v. Admins. of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991) (holding that, where court lacks jurisdiction, it has "no discretion to dismiss rather than remand the action"); *see also Blackwater*, 460 F.3d at 589 (characterizing decision to remand after finding lack of jurisdiction, and not to rule on pending motion to dismiss, as "purely

ministerial"); *Carlson*, 445 F.3d at 1046 (noting that a denial of a motion to dismiss after a decision to remand is "superfluous").

When a district court lacks subject-matter jurisdiction, the court of appeals has "no authority to consider the merits." *Am. Hosp. Ass'n v. Azar*, 895 F.3d 822, 828 (D.C. Cir. 2018). Here, there is thus nothing for this Court to review.

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Respectfully submitted,

s/ Adam R. Pulver
Adam R. Pulver
Allison M. Zieve
Scott L. Nelson
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-7790
apulver@citizen.org

Counsel for Appellees

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 27(a)(d)(2) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court, it contains 5,048 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO in 14-point Century Schoolbook.

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/s/ Adam R. Pulver
Adam R. Pulver