UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT SINGER, Individually and as Administrator of the Estate of Gloria A. Singer (Deceased), et al. (22-3083), Plaintiffs-Appellees, v. MONTEFIORE, et al., Defendants-Appellants.	Nos. 22-3083/3084
ROBERT SINGER, Individually and as Administrator of the Estate of Gloria A. Singer (Deceased) (22-3084), Plaintiff-Appellee, v. MONTEFIORE, et al., Defendants-Appellants.	

APPELLEES' REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION

Whether a defendant has a right to invoke a basis of jurisdiction in support of removal in the district court is a distinct question from whether a defendant has a right to appeal a district court's rejection of that asserted basis of jurisdiction. 28 U.S.C. § 1447(d) only allows review of an order rejecting an assertion of removal

jurisdiction where the order "remand[s] a case to the State court from which it was *removed* pursuant to [28 U.S.C.] section 1442 or 1443" (emphasis added). Under the Supreme Court's recent decision in *BP p.l.c. v. Mayor of Baltimore*, to fall within this exception, "a defendant's *notice of removal* must assert the case is *removable* in accordance with or by reason of" either section 1442 or 1443. *BP*, 141 S. Ct. 1532, 1538 (2021) (cleaned up; emphasis added).

Appellants address neither the text of section 1447(d) nor the Supreme Court's recent interpretation of that provision, choosing to focus on policy arguments about whether a defendant can assert additional bases for removal in the *district court*. Given the record here, this choice is understandable: All of the relevant notices of removal explicitly asserted that the underlying state-court actions were removable *solely* under 28 U.S.C. § 1441(a). The Facility Defendants' notices stated:

> This case is removable under 28 U.S.C. § 1441(a) on the basis of "original jurisdiction" because Plaintiff's Complaint asserts a claim "arising under" and governed by federal law within the meaning of 28 U.S.C. § 1331.

E.g., 21-cv-2102 RE 1 at ¶ 4. And Hyman's notices stated:

> [T]his case is removable under 28 U.S.C. § 1441(a) on the basis of 'original jurisdiction' because Plaintiff's Complaint asserts a claim "arising under" and governed by federal law within the meaning of 28 U.S.C. § 1331.

E.g., 21-cv-2120 RE 1 at ¶ 4.

Appellants do not contest that the Facility Defendants' notices of removal fail to meet the *BP* standard; they base their argument that the remand order is appealable under section 1447(d) entirely on an incomprehensible reference to section 1442 in the "argument" section of Hyman's notices. In so doing, Appellants mischaracterize as "nit-picking" and "hyper-technical" Appellees' argument that a passing reference to a statute is not the same as invoking it as a ground for removal. Opp'n 14. It is not "nit-picking" to conclude that when a defendant explicitly states that a "case is removable under 28 U.S.C. § 1441(a) on the basis of 'original jurisdiction,'" he has not "assert[ed] the case is removable 'in accordance with or by reason of'" section 1442, as *BP* requires—even if he cites section 1442 in passing as further support for his argument that the case would be removable under section 1441 based on the doctrine of complete preemption. A mere mention of section 1442—in a statement referring to original jurisdiction and without *any* allegations supporting federal-officer removal—is not sufficient to trigger the exception to the rule against review of remand orders.

Because Hyman's notice of removal would be insufficient to trigger the exception to the review bar in section 1447(d) were it the *only* notice of removal, the Court need not address the novel question of how *BP*'s section 1447(d) test applies where a defendant consents to removal on one ground and then later files a notice of removal on additional grounds. As to that question, though, section 1447(d)'s plain-

text asks whether a "case" has been "removed" based on section 1442 or 1443. And under 28 U.S.C. § 1446(d), removal is "effected" upon the filing and service of a notice of removal consistent with the other requirements of section 1446. Hyman's consent to the Facility Defendants' notices of removal meant all of those elements were satisfied at the time those notices were filed and served, and thus the state court cases were "removed" at that time. Appellants' response to this argument fails to address section 1447(d) and its text, and focuses solely on whether defendants can raise additional grounds for removal in district court. Even then, Appellants' policy concerns are misplaced: Hyman *chose* to consent to removal solely on the basis of section 1441(a). That his choice to do so, like the other Appellants' choice not to raise federal-officer removal in their Notices of Removal, has consequences is not a basis for ignoring the text of the statute.

ARGUMENT

I. Hyman's notices of removal did not assert that the cases were removable in accordance with or by reason of section 1442.

Appellants' argument as to the sufficiency of Hyman's notices of removal to trigger the 1447(d) exception barely addresses the content of those notices and mischaracterizes their contents where it does. A review of those notices shows why, even under a liberal pleading standard, Hyman's reference to section 1442(d) in the "Argument" section of his notices does not meet the *BP* standard.

Hyman's notices of removal contained three numbered headings: "Statement of the Case & Procedural Requirements," "COVID-19 and the PREP Act," and "Argument and Citation to Authority." In the first section of each notice, Hyman set out a short and plain statement of the basis for removal, alleging that the case was removable under section 1441(a) because federal courts would have original jurisdiction over the action pursuant to 28 U.S.C. § 1331, on the theory that the complaint asserted a claim arising under the Public Readiness and Emergency Preparedness Act, 42 U.S.C. §§ 247d-6d, 247d-6e (the "PREP Act"). *See, e.g.*, 21-cv-2120 RE 1 at ¶¶ 4–5. In the second section, Hyman made statements about the PREP Act, its invocation in response to COVID-19, and its preemptive scope. *Id.* ¶¶ 7–11. In the third section, Hyman discussed his theory of complete preemption under the PREP Act, citing complete preemption case law. *Id.* ¶¶ 12–19. The notices' only reference to section 1442 appears in that third section, in a paragraph stating:

> This case is removable under 28 U.S.C.A. § 1441(a) on the basis of "original jurisdiction" because Plaintiff's Complaint asserts a claim "arising under" federal law within the meaning of § 1331. Original jurisdiction is also through an action pursuant to 28 U.S.C. §1442(a)(1). The Court also has supplemental jurisdiction over state law claims under 28 U.S.C. § 1367.

Id. ¶ 12. The "argument" section contains no other reference to federal-officer removal, no reference to the requisite elements of federal-officer removal, and no facts or case law that would support federal-officer removal.

Hyman's passing reference to section 1442—in language one district court has described as "nearly impossible to parse"— is not an assertion that these cases are *removable* pursuant to section 1442 or 1443, as required by *BP*. *Spring v. Montefiore Home*, No. 1:21-cv-02124-PAB, 2022 WL 1120381, at *6 n.2. Although no appellate court appears to have yet addressed the question of what language is sufficient to meet this requirement, three lines of case law assessing waiver of bases for jurisdiction are instructive. *First*, as noted in Appellees' motion, in the context of assessing waiver, courts have repeatedly held a defendant must do more than merely reference a statute or doctrine in its notice of removal to preserve a basis of jurisdiction. *See* Motion 13–14 (citing *County of San Mateo v. Chevron Corp.*, __ F.4th __, 2022 WL 1151275, at *18 n.23 (9th Cir. Apr. 19, 2022); *Thompson v. Gulf Stream Coach, Inc.*, No. 1:07-CV-49, 2007 WL 2413108, at *2–3 (W.D. Mich. Aug. 21, 2007); *Sonoma Falls Developers, LLC v. Nev. Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 925 (N.D. Cal. 2003). *Second*, courts have been equally clear that, even if the factual allegations contained in a notice of removal could support a particular theory of removal jurisdiction, that theory of removal jurisdiction will be deemed waived unless it is specifically invoked. *See, e.g.*, *Ervast v. Flexible Products Co.*, 346 F.3d 1007, 1012 n.4 (11th Cir. 2003) (holding that regardless of whether factual allegations demonstrated diversity of parties, the failure to explicitly invoke diversity jurisdiction as basis of removal in the removal notice constituted

waiver); *Hellmuth v. City of Trenton*, No. 1:19-CV-258, 2019 WL 3543082, at *6 (S.D. Ohio Aug. 5, 2019), *report and recommendation adopted*, 2020 WL 553936 (S.D. Ohio Feb. 4, 2020) (same); *Nero v. Maserati N. Am., Inc.*, No. 1:17-CV-1574, 2017 WL 4124976, at *2 (N.D. Ohio Sept. 18, 2017) (same). *Third*, even where a defendant has invoked a basis for jurisdiction, the defendant cannot proceed on a different theory as to the applicability of that basis than the one contained in the notice of removal. *See, e.g.*, *Mays v. City of Flint, Mich.*, 871 F.3d 437, 446–47 (6th Cir. 2017) (refusing to consider documents as source of federal-officer direction for purposes of section 1442(a) where the notice of removal identified only *other* documents as the source of direction); *Hahn v. Rauch*, 602 F. Supp. 2d 895, 909 (N.D. Ohio 2008) (finding that the defendants waived complete preemption by the NLRA or LMRDA as a basis for removal jurisdiction where the notice of removal invoked only complete preemption by the LMRA and ERISA).

Ignoring this case law, Appellants invoke inapposite cases about typographical and other "technical errors" in notices of removal and about "notice pleading." Opp'n 13–16. But Hyman's failure to invoke section 1442(a) as a ground for removal was not a "technical error." *Cf. Gianelli v. Schoenfeld*, No. 221CV0477, 2021 WL 2106365, at *13 (E.D. Cal. May 25, 2021), *report and recommendation adopted*, 2021 WL 2662044 (E.D. Cal. June 29, 2021) (distinguishing between "technical omissions" in notices of removal and those that "prejudice the plaintiff or

impede the court's ability to proceed with the case"); *Crow v. Melton*, No. 3:17-CV-3103, 2018 WL 10419358, at *11–12 (N.D. Tex. Feb. 20, 2018), *report and recommendation adopted*, 2018 WL 10419359 (N.D. Tex. Mar. 23, 2018) (holding that "merely mentioning 'fraudulent joinder' in passing" in the notice of removal was not a "technical defect" sufficient to preserve another theory of "improper joinder").

As for the notice-pleading standard, Appellees do not dispute that it applies in assessing whether *factual* allegations are sufficient to support the basis of jurisdiction invoked in a notice of removal. *See Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 87 (2014). But the issue here is not the standard for assessing the adequacy of factual allegations in support of an asserted ground for removal, but rather whether a ground for removal was asserted at all. As to that question, the case law is clear that courts do not infer bases of removability not specifically asserted. *See supra* pp. 6–7. And Appellants present no authority for the proposition that courts should interpret a notice as invoking one basis for removability when the notice explicitly invoked a different statute as the sole basis for removability.

Not only does the notice-pleading standard not apply to the question of appellate jurisdiction, but Hyman's notices did not meet the standard in any event. His notices are bereft of *any* allegations supporting a theory of federal-officer removal. As this Court has explained, to satisfy the requirements of section 1442(a),

a notice of removal must "identify [] specific actions or inactions alleged in the complaint" that were taken at the direction of a federal officer. *Mays*, 871 F.3d at 445. No such actions or inactions were identified here. The removal notices' focus on complete preemption and the PREP Act, and the absence of allegations going to the elements of federal-officer removal (or any legal argument supporting it), did not put plaintiffs on notice that Hyman was purporting to remove on that basis. Accordingly, when the plaintiffs moved to remand the actions to state court, their consolidated remand motion only addressed federal-question jurisdiction. *See* 21-cv-2102 RE 14. Appellants' statement that "[t]he parties fully briefed Appellees' remand motions, including the propriety of removal under both Section 1441 *and* Section 1442" is thus incomplete. Opp'n 4. Appellees addressed removal under section 1442 only in their reply brief—while also arguing that the theory was waived because "Defendants did not assert the federal officer removal statute as a basis for removal in their notices of removal." 21-cv-2102 RE 16 Page ID # 9.

II. Hyman's Notices of Removal Are, in Any Event, Irrelevant.

Even if Hyman's notices had asserted that each case was removable pursuant to section 1442, those notices would remain irrelevant for purposes of section 1447(d). Under that statute's plain text, appellate jurisdiction turns on whether a *case* "was removed [from state court] pursuant to section 1442"—not whether any defendant subsequently referenced or invoked 1442. Absent from Appellants'

opposition is any explanation of how, once a case is "removed," it can be removed again (unless it has been remanded in the interim). It cannot be: 28 U.S.C. § 1446(d) specifies that filing a notice of removal that complies with the requirements of 28 U.S.C. § 1446(b), with service to adverse parties and the state court "shall effect the removal." "Once a defendant complies with § 1446, a state court may not proceed 'further unless and until the case is remanded.'" *BP*, 141 S. Ct. at 1539 (citing 28 U.S.C. § 1446(d)). Here, there is no dispute that the Facility Defendants' notices of removal met all the requirements of section 1446, and thus removal was effected when those notices were filed and served—i.e., *before* Hyman filed his notice.

Appellants' policy arguments cannot overcome the statutory text. *See BP*, 141 S. Ct. at 1542 (declining to disregard text of 1447(d) due to "the policy consequences that follow from giving the text its ordinary meaning"). Moreover, the concerns they raise erroneously conflate the question of when or whether, after a case has already been removed, a defendant who consented to that removal can invoke additional grounds for federal jurisdiction in *district court*, with the question whether those additional grounds trigger the exception to the bar on review contained in section 1447(d). The premise of section 1447(d) is that a defendant will *not* be able to seek appellate review every time it invokes an applicable ground for removal. Whether or not a party has a "statutory right to assert all applicable grounds for removal,"

Opp'n 1, section 1447(d) is clear that a defendant's right to appellate review turns on whether the case was removed on grounds specified in section 1447(d).

Had Hyman wanted to ensure appellate review of jurisdictional grounds *not* contained in the Facility Defendants' notices, he could have done so: He could have declined to consent to removal solely on 1441(a) grounds and filed his own notice of removal. In that scenario, the case would have been "removed" at the time of the latter notice of removal, at which point all of the requirements of section 1446 would have been satisfied. Instead, he consented to removal and could not the next week "remove" the case on another basis.

CONCLUSION

For the foregoing reasons and those stated in their motion, Plaintiffs-Appellees respectfully request the Court dismiss the appeals in their entirety for lack of jurisdiction.

May 19, 2022

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 motion 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 2,488 words.

This motion 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 Times New Roman.

May 19, 2022

/s/ Adam R. Pulver
Adam R. Pulver

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

May 19, 2022

/s/ Adam R. Pulver
Adam R. Pulver