No. 19-278

In the
Supreme Court of the United States

PFIZER, INC. AND GREENSTONE LLC,
Petitioners,
v.
SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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November 5, 2019

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RELATED PROCEEDINGS

A petition for writ of certiorari involving the same cases at issue in this Petition was previously pending in *Pfizer Inc. v. Adamyan*, No. 18-1578. On October 7, 2019, this Court denied the certiorari petition in *Adamyan*.

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INTRODUCTION

There is no dispute that these coordinated cases involve the same procedural configuration as in *Bristol-Myers Squibb v. Superior Court*, 137 S. Ct. 1773 (2017). As a result, due process precludes personal jurisdiction over the claims of non-resident Plaintiffs. Nor is there any dispute that Pfizer preserved that personal jurisdiction defense from waiver by stating it in its answers. And authority from this Court and the Courts of Appeals unanimously holds that a defendant's assertion of federal subject matter jurisdiction cannot effect a forfeiture of its personal jurisdiction defenses.

Rather than grappling with these straight-forward points, Respondents deny that the case even presents the question of whether invocation of federal subject matter jurisdiction can forfeit personal jurisdiction. But that is precisely what Respondents asked the lower courts to hold. And it is precisely what those courts held. Respondents' reconstruction of the record below cannot save the unprecedented rule that the California courts fashioned to avoid *Bristol-Myers*.

The primary basis for the trial court's decision was that Pfizer forfeited personal jurisdiction because it "had more than enough time" to raise the issue while these cases were in the federal multi-district litigation (MDL). Pet.App.12. Yet, because the only litigation that took place in these cases while they were in the MDL involved subject matter jurisdiction, the trial court necessarily ruled that Pfizer's litigation of subject matter jurisdiction forfeited personal jurisdiction. Pet.App.11-12. The only other basis for forfeiture

noted by the trial court was that Pfizer "urged the [MDL court] to enter summary judgment . . . after rejecting Plaintiffs' subject matter jurisdiction arguments." Pet.App.13-14. But, as explained in the Petition, that request was merely a standard conditional waiver of personal jurisdiction that is ineffective where its condition—a finding of subject matter jurisdiction—is unmet. Pet.23-24.

There is thus no ambiguity about what the California courts decided in these cases, and there is no support for those decisions under federal law. On the contrary, the decisions below defy the unanimous precedents of this Court and the Courts of Appeals. Absent this Court's review, thousands of non-resident products liability claims will be stuck in the California state courts in direct violation both of *Bristol-Myers* and of this Court's settled law against forfeiture through removal. As *amici* explain, this double "evasion of precedent adds to a growing list of California rulings that have sought to circumvent the clear command of *Bristol-Myers*." ATRA.Br.4 & n.3. To ensure that *Bristol-Myers* is enforced, this Court should grant certiorari and reverse.

ARGUMENT

I. The Question Presented Was The Primary Basis For The California Courts' Rulings.

The decisions below indisputably raise the question presented. The primary basis for the California courts' decisions was their determination that Pfizer's litigation of subject matter jurisdiction forfeited personal jurisdiction. On its face, the trial court decision held that, while in the MDL, "the Pfizer Defendants had more than enough time to litigate their defense of lack of personal jurisdiction as to the non-California Plaintiffs in the California cases but did not do so," which the Court held "result[ed] in a forfeiture of the defense." Pet.App.12. But during the period in which the court said Pfizer had "more than enough time" to litigate personal jurisdiction, these cases were stayed pending determination of subject matter jurisdiction. *See* Pet.App.11, 86. Thus, Pfizer's assertion and litigation of federal subject matter jurisdiction was the only conduct supporting the lower court's finding that Pfizer forfeited its personal jurisdiction defense.

The trial court's decision, which laid out Pfizer's "conduct" in these cases in the MDL, all of which arose directly out of Pfizer's assertion of subject matter jurisdiction, confirms that its decision turned on the question presented here. The trial court noted that Pfizer "began removing these actions to federal courts in March 2014." Pet.App.11. Then, the trial court observed that "[i]nstead of filing a motion to dismiss all claims brought by out-of-state Plaintiffs, Defendants sought transfer of the cases to the MDL proceeding" to

litigate subject matter jurisdiction on a coordinated basis. *Id.* And it stated that Pfizer sought "narrowly tailored jurisdictional discovery that could be used to support Defendants' arguments in favor of maintaining subject matter jurisdiction in the MDL proceeding." *Id.*[1] This direct tie between all of the conduct in these cases identified by the trial court and Pfizer's litigation of subject matter jurisdiction confirms that the decisions below addressed the question presented.

Indeed, Respondents repeatedly asked the trial court to do exactly what they now claim it did not do. Respondents argued that Pfizer cannot "have it both ways" by arguing for subject matter jurisdiction and against personal jurisdiction over claims by non-resident plaintiffs. Resp.App.85. They argued at length in the trial court that "Pfizer's efforts to have the claims adjudicated in the MDL were tantamount to Pfizer asserting that the claims belonged in a California forum." Resp.App.81; *see also* Resp.App.82-86. Then they re-urged the very same thing on appeal, emphasizing in their briefing to the California Supreme

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[1] Respondents mischaracterize this "narrowly tailored jurisdictional discovery," Pet.App.11, as a request for merits discovery, based on Pfizer's statements that it was relevant to "the merits . . . and the jurisdictional issues" with regard to Respondents' "claims against McKesson." Opp.23. But because the jurisdictional discovery sought to establish that McKesson was fraudulently joined to defeat diversity, it necessarily implicated the merits of claims against McKesson. *See* Pet.App.84, 87. Nor did Pfizer consent to litigation on the merits by seeking Respondents' participation in the MDL depositions of Pfizer's witnesses. *See* Opp.23-24. Respondents would have participated in those MDL depositions even if their actions had been pending in state court. Pet.15 & n.2.

Court that "Pfizer removed the California cases without raising personal jurisdiction . . . challenges." Resp.App.10. Even now, Respondents continue to argue this point in this Court, noting that, instead of "asserting a personal jurisdiction challenge," Pfizer "remov[ed] all cases to federal court." Opp.4; *see also* Opp.11.[2]

Respondents attempt to defend these assertions by repeating the trial court's misunderstanding of *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), insisting that Pfizer could have—and therefore should have—filed a dispositive motion on personal jurisdiction along with subject matter jurisdiction. Opp.II. But they are wrong on both counts. Under *Ruhrgas*, personal jurisdiction should be addressed first only if it will "stop the court from proceeding to the merits of the case" and thus obviate the need to decide subject matter jurisdiction. 526 U.S. at 584; *accord Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007). Pfizer could not have done so here because its personal jurisdiction defense would only dispose of the claims of the non-resident Plaintiffs. *See* Pet.6, 22. Even after the dismissal of those non-resident Plaintiffs, there would

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[2] Contrary to a previous agreement they reached with counsel for Pfizer, Respondents also appear to argue that the timing of Pfizer's filing of its personal jurisdiction motion in state court was evidence of forfeiture. Opp.11-13. But the parties negotiated the deadline for the filing of that motion in state court in the interest of judicial efficiency. In any event, as the trial court observed, Respondents only argued forfeiture below based on Pfizer's conduct in federal court, Pet.App.8, and they have thus waived any argument of forfeiture based on state-court conduct.

not have been subject matter jurisdiction over the remaining California Plaintiffs because they would not be diverse from Defendant McKesson Corp. *See id.*[3] Thus, the MDL court could not have granted Pfizer's personal jurisdiction motion until it first determined that it had subject matter jurisdiction over the entire action. There would have been no point in Pfizer filing a personal jurisdiction motion that the MDL court would have been powerless to decide before having found subject matter jurisdiction.

More important, even if Pfizer *could* have asserted its personal jurisdiction defense simultaneous with removal, that would not require it to do so. The law rejects the notion that a defendant's assertion of its statutory right to federal jurisdiction and its constitutional right to an appropriate forum is an attempt, in Respondents' words, to "have it both ways." Resp.App.85. To the contrary, this Court explained over a century ago that this rule against forfeiture through removal is "essential" to prevent plaintiffs from forcing a defendant to choose between litigation in "a jurisdiction not of his residence" or asserting his right to "a more impartial tribunal" in federal court. *Cain v. Commercial Pub. Co.*, 232 U.S. 124, 133 (1914). Yet, that is the choice the California courts forced Pfizer to make—at Respondents' express urging.

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[3] The presence of McKesson as a forum defendant distinguishes these cases from the Missouri Lipitor cases referred to in Respondents' opposition where, because of the absence of a forum defendant, Pfizer's request to dismiss the non-resident Plaintiffs for lack of personal jurisdiction would have obviated any problem of subject matter jurisdiction between the Missouri plaintiffs and Pfizer. *See* Pet.App.84-85.

"[L]eft undisturbed, the California courts' rulings would effectively nullify *Ruhrgas* and compel defendants in California's courts to litigate personal jurisdiction before subject matter jurisdiction in *every* removed case, lest they be later held to have forfeited the former defense." ATRA.Br.5.

Both this Court's precedents and a unified wall of decisions from the Courts of Appeals reject the theory that asserting subject matter jurisdiction forfeits personal jurisdiction. *See* Pet.II.A. This Court held over 120 years ago that whether an "attempt to remove should be successful or unsuccessful"—a determination that requires litigation—it cannot "be treated as submitting the defendant to the jurisdiction of the state court for any other purpose." *Goldey v. Morning News of New Haven*, 156 U.S. 518, 525-26 (1895). Pfizer's litigation of subject matter jurisdiction cannot result in forfeiture of its due process rights.

* * *

Nor did Pfizer's filing of an omnibus motion for summary judgment in the MDL make any difference. At most, that motion offered a run-of-the-mill conditional waiver of personal jurisdiction by requesting that summary judgment procedures take place in these cases following a finding of subject matter jurisdiction—a condition that was never met. As the trial court acknowledged, Pfizer's briefing requested that summary judgment procedures occur in these cases only "*after* rejecting Plaintiffs' subject matter jurisdiction arguments." Pet.App.14 (emphasis added). It further observed that Pfizer's motion for summary judgment had noted that the California cases

were "subject to pending remand motions." Pet.App.5-6. Indeed, Pfizer's summary judgment briefing specifically stated that summary judgment in these cases would require further procedures beyond its omnibus motion—that is, the MDL court could "issue a similar order" commencing summary judgment procedures in these cases "*after addressing the remand motions*." Pet.App.52 (emphasis added). And Respondents acknowledge that Pfizer's request for summary judgment was contingent on the success of its position that the MDL court "'has subject matter jurisdiction over all cases in the MDL.'" Opp.8 (quoting Pet.App.51).

In fact, summary judgment procedures never even occurred in these cases because the MDL court did not find subject matter jurisdiction. Instead, because it was contingent on federal subject matter jurisdiction, Pfizer's motion for summary judgment implicated the threshold question of subject matter jurisdiction, which as explained above cannot forfeit personal jurisdiction. Pfizer did not, as Respondents say, move for summary judgment without asserting a personal jurisdiction defense. *See* Opp.26. Rather, at most, it offered a conditional waiver of personal jurisdiction defenses in the event that subject matter jurisdiction were established in the MDL. *See* Pet.23-24; *see also* Pet.App.66 (stating in California federal courts that personal jurisdiction "goes away" if subject matter jurisdiction is established). It was Pfizer's right, if subject matter jurisdiction was secured, to call for a decision on personal jurisdiction or for "judgment on the merits." *Gen. Inv. Co. v. Lake Shore & M.S. Ry. Co.*, 260 U.S. 261, 268-69 (1922). Respondents cite no

authority that has ever held that such a routine conditional waiver of personal jurisdiction is binding even where its condition is not fulfilled. *See* Pet.23-24; ATRA.Br.10-11. There is none.

II. The California Courts' Misuse Of The Federal Law Of Forfeiture To Evade *Bristol-Myers* Warrants Review And Reversal.

If allowed to stand, the rule fashioned by the California courts would undermine efficient management of civil litigation, especially in MDL proceedings, and would force defendants to an untenable choice between their statutory right to an impartial federal forum and their constitutional right to a forum with some minimum connection to the claims against them. Moreover, the rulings below chart yet another course among the many paths that the California courts have cut around *Bristol-Myers*, conferring state-court jurisdiction over massive multi-plaintiff actions brought by persons with no connection to the forum. *Bristol-Myers* means what it says, and this Court should grant review, enforce its judgment, and reverse. *See BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017).

As *amici* observe, the illogic and unworkability of the California courts' rule is particularly apparent in the MDL context. ATRA.Br.II. MDL courts exercise personal jurisdiction "to the same extent that the transferor court could" in each individual case. *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 297 n.11 (3d Cir. 2004); *accord In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987). Thus, in the MDL context, personal jurisdiction does

not typically become relevant until the cases are returned to the transferor courts after pre-trial proceedings are complete—that is, *after* summary judgment. *See* 28 U.S.C. § 1407(a); *Manual for Complex Litigation* (Fourth) § 22.36 (2004) (noting MDL court's authority to enter summary judgment but not to try cases). Here, Pfizer's actions were consistent with that general rule. Pfizer conditionally proposed to waive personal jurisdiction where a finding of subject matter jurisdiction would have led to complete dismissal on the merits, *see In re Lipitor Mktg., Sales Practices & Prod. Liab. Litig.*, 892 F.3d 624 (4th Cir. 2018), since a successful personal jurisdiction defense would have scattered the cases to federal courts in all fifty states on the eve of their disposition. That the California courts required Pfizer to have moved on its personal jurisdiction defenses in the midst of these coordinated pre-trial proceedings and at a time when they *could not* have been decided by the MDL court is antithetical to the efficiency purposes of the MDL statute. *See* 28 U.S.C. § 1407(a). And it is "bad policy because a defendant's decision to assert a personal jurisdiction defense may well be informed by whether it will have to defend against the claims at issue in a state or federal forum." ATRA.Br.6.

The lower courts here thus retroactively erected unprecedented and doctrinally illogical procedural hurdles to the assertion of personal jurisdiction defenses under federal law. They did so in direct contradiction of an unbroken chain of precedents from this Court and the Courts of Appeals. Seeking to exercise "coercive power" despite "little legitimate interest in the claims in question," the California

courts' rulings here directly conflict with *Bristol-Myers*' core holding. 137 S. Ct. at 1780. Because they flout *Bristol-Myers* and every known authority on forfeiture under federal law, this Court should grant certiorari and reverse.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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