No. _____

In The
Supreme Court of the United States

BAYER HEALTHCARE
PHARMACEUTICALS INC., et al.,

Petitioners,

v.

CURTIS ULLESEIT, et al.,

Respondents.

BAYER HEALTHCARE
PHARMACEUTICALS INC., et al.,

Petitioners,

v.

BETH WINKLER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 28 U.S.C. 1447(d), courts of appeals generally may not review orders remanding removed cases to state court. But Section 1447(d) also states that an "order remanding a case * * * removed pursuant to" 28 U.S.C. 1442, the federal-officer removal statute, or 28 U.S.C. 1443, the civil-rights removal statute, "shall be reviewable by appeal or otherwise." Some courts read Section 1447(d) to create appellate jurisdiction over all issues in a district court's remand order when the removing party included the federal-officer or civil-rights removal statutes among its bases for removal. Other courts, such as the Ninth Circuit, hold that appellate jurisdiction exists only to decide whether removal was proper under the federal-officer or civil-rights statutes.

The question presented is identical to the question presented in *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (argued Jan. 19, 2021):

Whether 28 U.S.C. 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443.

PARTIES TO THE PROCEEDING

Petitioners are Bayer HealthCare Pharmaceuticals Inc., Bayer Corporation, and Bayer HealthCare LLC, who were defendants-appellants below.

Respondents are Curtis Ulleseit, Lisa Wehlmann, and Beth Winkler, who were plaintiffs-appellees below. Kathleen Geisse appeared as a plaintiff-appellee in the court of appeals, but dismissed her claims voluntarily before the court of appeals entered judgment.[1]

CORPORATE DISCLOSURE STATEMENT

Petitioner Bayer HealthCare Pharmaceuticals Inc. is a corporation with all issued and outstanding shares of common stock owned by Schering Berlin Inc. Schering Berlin Inc. is wholly owned by Bayer HealthCare Holdings LLC. Bayer HealthCare Holdings LLC is a limited liability company whose sole member is Bayer Corporation. Bayer Corporation is wholly owned by Bayer US Holding LP. Bayer US Holding LP is a limited partnership in which Bayer World Investments B.V. is the sole and controlling general partner, and Bayer Solution B.V. is the sole limited partner. Bayer Solution B.V. is wholly owned by Bayer World Investments B.V. Bayer World Investments B.V. is wholly owned by Bayer Pharma AG, Bayer US II GmbH & Co.

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[1] McKesson Corporation, McKesson Medical-Surgical, Inc., and Merry X-Ray Chemical Corporation were defendants in the district court but did not appear in the court of appeals.

CORPORATE DISCLOSURE STATEMENT—
Continued

KG and Bayer US AG & Co. KG. Bayer Pharma AG is wholly owned by Bayer AG. Bayer US II GmbH & Co. KG is a limited partnership in which Bayer Intellectual Property GmbH is its general partner and Bayer US IP GmbH is its limited partner, each of which is wholly owned by Bayer AG. Bayer US AG & Co. KG is a limited partnership in which Bayer CropScience AG is its general partner and Bayer US IP GmbH is its limited partner, each of which is wholly owned by Bayer AG. Bayer AG has no parent company and no publicly held company which owns 10 percent or more of its stock.

Petitioner Bayer Corporation is wholly owned by Bayer US Holding LP. Bayer US Holding LP is a limited partnership in which Bayer World Investments B.V. is the sole and controlling general partner, and Bayer Solution B.V. is the sole limited partner. Bayer Solution B.V. is wholly owned by Bayer World Investments B.V. Bayer World Investments B.V. is wholly owned by Bayer Pharma AG, Bayer US II GmbH & Co. KG and Bayer US AG & Co. KG. Bayer Pharma AG is wholly owned by Bayer AG. Bayer US II GmbH & Co. KG is a limited partnership in which Bayer Intellectual Property GmbH is its general partner and Bayer US IP GmbH is its limited partner, each of which is wholly owned by Bayer AG. Bayer US AG & Co. KG is a limited partnership in which Bayer CropScience AG is its general partner and Bayer US IP GmbH its limited partner, each of which is wholly owned by Bayer

CORPORATE DISCLOSURE STATEMENT—
Continued

AG. Bayer AG has no parent company and no publicly held company which owns 10 percent or more of its stock.

Petitioner Bayer HealthCare LLC is a limited liability company whose members are NippoNex Inc., Bayer Medical Care Inc., Bayer West Coast Corporation, Bayer Essure, Inc., Bayer Consumer Care Holdings LLC, Bayer Samson I LLC, Bayer Samson II LLC, MiraLAX LLC, and Bayer HealthCare US Funding LLC, and as such Bayer HealthCare LLC is owned by those entities. NippoNex Inc. is wholly owned by Bayer HealthCare Pharmaceuticals Inc. Bayer Medical Care Inc. is wholly owned by Schering Berlin Inc. Bayer West Coast Corporation and Bayer Essure, Inc. are each wholly owned by Bayer HealthCare Holdings LLC. Bayer Samson I LLC, Bayer Samson II LLC, and MiraLAX LLC are limited liability companies in which Bayer HealthCare US Funding LLC is the sole member, and as such, each is wholly owned by Bayer HealthCare US Funding LLC. Bayer Consumer Care Holdings LLC is a limited liability company whose sole common member is Bayer East Coast LLC, and whose sole preferred member is Bayer HealthCare US Funding LLC. The sole member of Bayer East Coast LLC is Bayer US Holding LP. Bayer HealthCare US Funding LLC is a limited liability company whose sole member is Bayer US Holding LP. Bayer US Holding LP is a limited partnership in which Bayer World Investments B.V. is the sole and controlling general partner, and

CORPORATE DISCLOSURE STATEMENT—
Continued

Bayer Solution B.V. is the sole limited partner. Bayer Solution B.V. is wholly owned by Bayer World Investments B.V. Bayer World Investments B.V. is wholly owned by Bayer Pharma AG, Bayer US II GmbH & Co. KG and Bayer US AG & Co. KG. Bayer Pharma AG is wholly owned by Bayer AG. Bayer US II GmbH & Co. KG is a limited partnership in which Bayer Intellectual Property GmbH is its General Partner and Bayer US IP GmbH is its Limited Partner, each of which is wholly owned by Bayer AG. Bayer US AG & Co. KG is a limited partnership in which Bayer CropScience AG is its general partner and Bayer US IP GmbH is its limited partner, each of which is wholly owned by Bayer AG. Bayer AG has no parent company and no publicly held company which owns 10 percent or more of its stock.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

Geisse, et al. v. Bayer HealthCare Pharms. Inc., et al., No. 3:17-cv-07026 (March 18, 2019)

Winkler v. Bayer HealthCare Pharms. Inc., et al., No. 4:18-cv-03077 (March 18, 2019)

United States Court of Appeals (9th Cir.):

Ulleseit, et al. v. Bayer HealthCare Pharms. Inc., et al., No. 19-15778 (Sept. 16, 2020)

Winkler v. Bayer HealthCare Pharms. Inc., et al., No. 19-15782 (Sept. 16, 2020)

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Bayer HealthCare Pharmaceuticals Inc., Bayer Corporation, and Bayer HealthCare LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth

Circuit in these cases. Pursuant to this Court's Rule 12.4, Bayer HealthCare Pharmaceuticals Inc., Bayer Corporation, and Bayer HealthCare LLC (collectively "Bayer") are filing a "single petition for a writ of certiorari" because the "judgments * * * sought to be reviewed" are from "the same court and involve identical or closely related questions." Sup. Ct. R. 12.4.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, at 1a) is not officially reported but is available at 826 F. App'x 627 (9th Cir. 2020). The opinion of the district court (App., *infra*, at 6a) is not officially reported but is available at 2019 WL 1239854.

JURISDICTION

The judgment of the court of appeals in *Ulleseit, et al. v. Bayer HealthCare Pharms. Inc., et al.* and *Winkler v. Bayer HealthCare Pharms. Inc., et al.* was entered on September 16, 2020. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1447(d) of Title 28 of the United States Code states:

> 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.

STATEMENT

These cases present the same question as *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189. Just like in *BP*, the district court entered an order remanding the cases after holding that it lacked jurisdiction pursuant to either the federal-officer removal statute or other bases for removal that petitioners identified. The court of appeals then dismissed petitioners' appeal in part, ruling that it lacked appellate jurisdiction to consider any basis for removal other than the federal-officer statute. The question presented here—just as in *BP*—is whether 28 U.S.C. 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443.

This Court granted the petition in *BP* and heard oral argument on January 19, 2021. Petitioners accordingly request that the Court hold the petition in this case pending any decision in *BP*. And, for reasons argued by the *BP* petitioners, the Court should decide in *BP* that appellate jurisdiction exists over all issues in a district court's remand order, including all asserted removal grounds, where one of the bases for removal is the federal-officer statute. *See* Pet. Br. at 16–37, *BP*, *supra*. Petitioners request that the Court then grant the petition in this case, vacate the Ninth Circuit's decision below, and remand for reconsideration in light of the opinion in *BP*.

A. Statutory Background

A state-court defendant removes an action to the federal courts by filing a notice of removal in a federal district court. 28 U.S.C. 1446(a). The district court then decides if it has subject-matter jurisdiction. *See* 28 U.S.C. 1447(c). If it determines jurisdiction is lacking, the district court remands the case to state court. *See ibid.*

Federal appellate courts have limited jurisdiction over district courts' orders remanding cases. Generally, "an order remanding a case to [state court] is not reviewable on appeal or otherwise." 28 U.S.C. 1447(d). But Section 1447(d) explicitly provides that any "order remanding a case to the [s]tate court from which it was removed pursuant to" 28 U.S.C. 1442, the federal-officer removal statute, or 28 U.S.C. 1443, the civil-rights

removal statute, *is* "reviewable by appeal or otherwise." *Ibid.*

The statutory provisions allowing appeals from certain remand orders come from separate legislation enacted over many years. Congress decided to allow appeals of cases removed under the civil-rights statute in the Civil Rights Act of 1964. *See* Pub. L. No. 88-352, § 901, 78 Stat. 266 (1964). Orders remanding cases removed under the federal-officer statute became appealable under the Removal Clarification Act of 2011. *See* Pub. L. No. 112-51, § 2(d), 125 Stat. 546 (2011). These provisions are both codified in 28 U.S.C. 1447(d); they permit review "by appeal or otherwise" of the district court's "order remanding a case" to state court.

B. Bayer's Work Alongside the FDA Related to Magnevist

At the center of these cases is Magnevist, an FDA-approved gadolinium-based contrast agent ("GBCA") that has been marketed in the United States by Bayer HealthCare Pharmaceuticals Inc. Medical professionals intravenously administer Magnevist to patients to improve the quality of MRI images. These contrast-enhanced MRIs help doctors "identify[] serious health conditions such as cancer, infections, and bleeding." *Davis v. McKesson Corp.*, No. CV-18-1157, 2019 WL 3532179, at *1 (D. Ariz. Aug. 2, 2019). Gadolinium-based contrast agents, including Magnevist and others, "have been used more than 450 million times" since Magnevist became the first GBCA to gain approval in 1988. *Ibid.*

Particularly in light of GBCAs' importance in modern healthcare and Bayer's significant experience with GBCAs, the FDA has requested that Bayer provide it with information and advice about GBCAs. Bayer has given expert advice to two FDA Advisory Committees, bodies playing pivotal roles in the FDA's assessment of scientific information and regulatory decision-making. *See* Hutt et al., *Food and Drug Law* (3d ed. 2007) ("The FDA uses technical advisory committees of outside scientific experts to advise it on * * * scientific and clinical policy issues it confronts regarding product development and evaluation." (quoting Institute of Medicine, *Food and Drug Administration Advisory Committees* (1992))). Bayer provided written responses to the Committees' detailed questions, and Bayer employees appeared at Committee meetings, providing information and guidance and answering questions in person. *See, e.g.*, FDA, Trans. of Medical Imaging Drugs Advisory Comm. Hearing 62–77, 118–19 (2017), https://www.fda.gov/media/108935/download. Following several of these meetings, the Committees issued recommendations to the FDA informing aspects of the agency's decisions. *See* FDA, Safety Announcement (2017), https://www.fda.gov/Drugs/DrugSafety/ucm589213.htm (noting that FDA took action "after * * * consultation with the Medical Imaging Drugs Advisory Committee").

C. Litigation Alleging Scientifically Unsupported "Gadolinium Deposition Disease"

Beginning in 2016, a small number of patients began suing Bayer and other companies claiming that trace amounts of gadolinium that allegedly remained after use of GBCAs gave them "Gadolinium Deposition Disease," or "GDD." "GDD" is not a "disease" recognized by the medical community. As courts have noted, the FDA and its advisory committees have clarified "that the medical and scientific evidence does not establish that GBCAs cause GDD." *Davis*, 2019 WL 3532179, at *5.

Unsurprisingly, given Bayer's work under the FDA and the agency's extensive involvement with GBCAs, the "GDD" litigation often focused on Bayer's relationship with the federal government and federal law. Seeking to discredit the FDA's statements that cast doubt on "GDD," plaintiffs alleged that Bayer had acted "in concert with the FDA" and "collu[ded]" with the FDA to "fail[] to provide proper warnings of the dangers of GBCAs" to the public. *See Gremo v. Bayer Corp.*, No. 19-cv-13432, 2020 WL 1921952, at *5 (D.N.J. Apr. 21, 2020). And numerous courts ruled that federal regulations, along with the FDA's affirmative statements and actions, prohibited Bayer from warning about "GDD," meaning the plaintiffs' claims demanding such a warning were preempted by federal

law. *See, e.g.*, *McGrath v. Bayer HealthCare Pharms. Inc.*, 393 F. Supp. 3d 161, 172 (E.D.N.Y. 2019).[2]

D. Respondents' Suits Against Bayer

1. In 2016 and 2018, respondents filed suit in California state court claiming that Bayer had failed to warn them that Magnevist could cause "GDD." *See* App., *infra*, at 8a. Bayer removed these two actions, as well as three other cases filed by respondents' counsel, to the United States District Court for the Northern District of California. App., *infra*, at 7a.

Respondents moved to remand. Upon stipulation of the parties, the district court decided the remand motions in all five cases based on the arguments presented in Bayer's removal notice and the parties' subsequent briefing on the motion to remand in one of the suits, *Doe v. Bayer HealthCare Pharmaceuticals Inc.*, No. 18-cv-04568. *See* App., *infra*, at 7a–8a, 19a–23a.[3]

Bayer's removal notice identified two bases for federal jurisdiction. The first was diversity jurisdiction. *See* App., *infra*, at 9a; 28 U.S.C. 1332. The suits reflected disputes between respondents, California

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[2] *See also*, *e.g.*, *Klein v. Bayer HealthCare Pharms. Inc.*, No. 18-cv-01424, 2019 WL 3945652, at *5 (D. Nev. Aug. 21, 2019); *Sabol v. Bayer Healthcare Pharms., Inc.*, 439 F. Supp. 3d 131, 150 (S.D.N.Y. 2020); *Goodell v. Bayer HealthCare Pharms. Inc.*, No. 18-CV-10694, 2019 WL 4771136, at *4 (D. Mass. Sept. 30, 2019).

[3] The plaintiff in *Doe* subsequently dismissed that case voluntarily.

citizens who used Magnevist, and the Bayer entities, non-California citizens that marketed Magnevist and authored its warning label. In an attempt to destroy diversity, respondents had also named as defendants California distributors of medical products who lacked power to give warnings about Magnevist. *See* App., *infra*, at 9a. Bayer explained, however, that these distributor parties were fraudulently joined. *See* App., *infra*, at 10a–15a; *see also*, *e.g.*, *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 185–86 (1907).

Bayer's removal notice also stated that jurisdiction existed under the federal-officer removal statute. *See* App., *infra*, at 9a; 28 U.S.C. 1442(a)(1). Bayer noted that its actions under the FDA's Advisory Committees went beyond mere compliance with law, and "assist[ed]" the FDA's work of studying pharmaceutical products and evaluating relevant science. *See Goncalves By & Through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1245 (9th Cir. 2017). Respondents' claims had a "connection or association" with Bayer's relationship to the FDA since they focused on GBCA warnings the FDA approved following certain recommendations from the Advisory Committees. *See In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 471 (3d Cir. 2015) (quotation marks omitted), as amended (June 16, 2015).[4] Alternatively, Bayer pointed to respondents' allegations—not

[4] Bayer also identified several colorable federal defenses, including preemption. *See McGrath*, 393 F. Supp. 3d at 172. This point was not disputed in the court of appeals.

uncommon in this litigation—that pharmaceutical companies and the FDA worked in concert to keep known safety information from the public, a theory directly targeting actions Bayer supposedly took under the FDA.

2. The district court granted respondents' motions to remand in a brief unpublished opinion. *See* App., *infra*, at 6a–18a. Although Bayer had argued that the in-state defendants were fraudulently joined because all claims against them were preempted, the district court disagreed, stating that a "big[ ] problem" for this theory was a Ninth Circuit ruling in an unrelated context that "preemption * * * does not render a state law claim obviously barred or frivolous for fraudulent joinder purposes." *See* App., *infra*, at 13a–14a. The district court also rejected Bayer's fraudulent joinder argument that respondents' counsel had engaged in a pattern of "dismiss[ing] or not seriously pursu[ing] for settlement or judgment" the very same in-state defendants named in respondents' suits. *See* App., *infra*, at 14a. The court finally ruled that Bayer's argument under the federal-officer removal statute was "not well taken." *See* App., *infra*, at 14a–15a.

3. The Ninth Circuit dismissed Bayer's appeal in part and affirmed in part. The court first held that it had appellate jurisdiction to "review the district court's remand order *only* to the extent that it is based on [28 U.S.C.] §1442(a)(1)," the federal-officer removal

statute.[5] *See* App., *infra*, at 3a (emphasis added). Accordingly, the court ruled that it "lack[ed] jurisdiction to review Bayer's arguments concerning fraudulent joinder and diversity jurisdiction under § 1332" and dismissed those portions of the appeal. *See* App., *infra*, at 3a. The court then held that Bayer had not shown it could "remove this action under 28 U.S.C. §1442(a)(1)," either because Bayer had not "'act[ed] under' the FDA" or because Bayer's actions under the FDA were not "causally connected to plaintiffs' claims." *See* App., *infra*, at 4a–5a.

REASONS FOR GRANTING THE PETITION

This petition presents the same question as *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189, specifically whether 28 U.S.C. 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, or the civil-rights removal statute, 28 U.S.C. 1443. The Court granted the petition in *BP* and held oral argument on January 19, 2021.

As the Court will rule on that question in *BP*, Bayer requests that the Court hold this petition until

[5] In ruling that it lacked jurisdiction over portions of Bayer's appeal, the Ninth Circuit cited its recent decision in *County of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020). The certiorari petition in *Chevron* is currently pending before this Court. *See Chevron Corp. v. San Mateo Cnty., Cal.*, No. 20-884.

it decides *BP*. And for reasons the *BP* petitioners' brief explains, the Court should rule in *BP* that appellate jurisdiction exists over the district court's *entire* remand order, including *all* grounds for removal, where one of the bases for removal is the federal-officer statute. *See* Pet. Br. at 16–37, *BP*, *supra*. Bayer requests that the Court then grant the petition in this case, vacate the decision below, and remand the case for reconsideration by the Ninth Circuit consistent with the *BP* decision.

CONCLUSION

The Court should hold the petition until its decision in *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189, and then dispose of the petition accordingly.

Respectfully submitted,

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