

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**

REPLY BRIEF FOR THE PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR THE PETITIONERS

All parties now agree that the Court should grant this petition, vacate the decision below, and remand for the Ninth Circuit’s reconsideration in light of the recent opinion in *BP p.l.c. v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532 (2021). Pet. at 11-12; Opp. at 3-4. That stands to reason: the Ninth Circuit’s decision in these cases rested on the same argument *BP* squarely rejected. Further, this Court has recently vacated and remanded for reconsideration several other cases similarly in conflict with *BP*.¹

1. This Court held in *BP* that “where the defendant premise[s] removal in part on the federal officer removal statute, [28 U.S.C.] § 1442,” “a court of appeals” has jurisdiction to “review any issue in a district court order remanding [the] case to state court.” *BP*, 141 S. Ct. at 1536, 1543. In *BP*, the defendants “invoked a variety of federal statutes” to remove a suit filed against them, including 28 U.S.C. § 1442, the federal-officer removal statute. *Id.* at 1536. Following removal, the district court remanded the suit. *Id.* at 1537. The defendants then appealed under 28 U.S.C. § 1447(d), which permits appeal of remand orders when defendants remove under 28 U.S.C. § 1442. *Id.*

When the *BP* defendants arrived in the Fourth Circuit, however, the court dismissed much of their

¹ See *Suncor Energy, Inc. v. B'd Comm'r's Boulder Cty.*, No. 20-783 (May 24, 2021); *Shell Oil Prods. Co. v. Rhode Island*, No. 20-900 (May 24, 2021); *Chevron Corp. v. San Mateo Cty.*, No. 20-884 (May 24, 2021).

appeal for want of jurisdiction. *Id.* “The Fourth Circuit read § 1447(d) as authorizing it to review only the *part* of the district court’s remand order discussing § 1442,” and “refused to consider whether the district court may have erred when it rejected the defendants’ other grounds for removal.” *Id.*

This Court vacated the Fourth Circuit’s judgment and remanded the case upon holding that a court of appeals has jurisdiction to consider *all* the defendants’ bases for removal when they remove in part under 28 U.S.C. § 1442. *Id.* at 1543. The Court explained that the text of 28 U.S.C. § 1447(d) permits review of the district court’s entire remand “order”—“not just some of its parts or pieces”—when a defendant removes under 28 U.S.C. § 1442. *Id.* at 1537-38.

2. In the present cases, the Ninth Circuit erred in precisely the same way the Fourth Circuit did in *BP*. Bayer removed under 28 U.S.C. § 1442 as well as other statutes and later appealed the district court’s remand order. Pet. App. at 9a. The Ninth Circuit then held that it had jurisdiction to “review the district court’s remand order only to the extent that it [was] based on [28 U.S.C.] §1442[.]” Pet. App. at 3a. The Ninth Circuit thus believed that it “lack[ed] jurisdiction to review Bayer’s arguments concerning” any other bases of removal beyond 28 U.S.C. § 1442, such as “fraudulent joinder and diversity jurisdiction,” and dismissed those portions of the appeal. Pet. App. at 3a.

BP, however, teaches that the Ninth Circuit’s dismissal was wrong. The court of appeals had

jurisdiction to consider *all* parts of the district court’s order remanding Bayer’s cases, not just “parts or pieces” of the order related to Bayer’s removal under 28 U.S.C. § 1442. *BP*, 141 S. Ct. at 1537-38.

3. Since the Ninth Circuit’s ruling was directly contrary to *BP*, this Court should grant the petition, vacate the decision below, and remand for reconsideration, which all parties agree is appropriate. Pet. at 11-12; Opp. at 3-4; *see also Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996) (noting appropriateness of order granting petition, vacating decision below, and remanding where this Court’s “own decisions” create “a reasonable probability that the decision below rests upon a premise that the lower court would reject”). The Court has done just that in other cases where courts incorrectly dismissed portions of remand order appeals without benefit of the decision in *BP*. *See Suncor Energy, Inc. v. B’d Comm’rs Boulder Cty.*, No. 20-783 (May 24, 2021); *Shell Oil Prods. Co. v. Rhode Island*, No. 20-900 (May 24, 2021); *Chevron Corp. v. San Mateo Cty.*, No. 20-884 (May 24, 2021). Notably, the Court issued such an order in *Chevron Corp. v. San Mateo Cty.*, No. 20-884, another Ninth Circuit case on which the panel squarely relied in dismissing portions of Bayer’s appeal here. *See* Pet. App. at 3a (“Under our recent decision in *County of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020),

we may review the district court’s remand order only to the extent that it is based on § 1442[.].”).²

CONCLUSION

The Court should grant the petition, vacate the decision below, and remand for the Ninth Circuit’s reconsideration in light of this Court’s recent opinion in *BP p.l.c. v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532.

Respectfully submitted,

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² Further, just as in *BP*, Bayer’s other arguments in favor of removal should be left “for the [Ninth] Circuit to resolve in the first instance.” *BP*, 141 S. Ct. at 1543.