24-7251

No. 25-_____

ORIGINAL

SUPREME COURT OF THE UNITED STATES

Michael Deuschel,

Petitioner,

vs.

Bayer Healthcare Pharmaceuticals, Inc., et al,

Respondents.

FILED
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SUPREME COURT, U.S.

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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When the Ninth Circuit ratified the District Court's denial of leave to amend on granting the Defendants' first 12b6 motion, it departed from fair judicial proceedings, created inconsistencies with other Circuits and this Supreme Court on federal doctrine, as well as California substantive law on delayed discovery and drug warning rulings, and created conflicts with the public policies of other federal agencies. Petitioner was denied due process by the courts' inconsistent practice of essentially dumping fee waived cases.

The District Court granted Bayer's first Rule 12B6 motion to dismiss the instant product defect claim on statute of limitations grounds because it concluded that Appellant's 2013 case against Kaiser for medical negligence meant the product defect claim against Bayer had also accrued no later than 2013. (1-ER-8-9) This ruling is plain error because it improperly treats knowledge of any wrongdoing as knowledge of all wrongdoing, for the purpose of accruing disparate causes of action under the applicable statute of limitations. This is contrary to settled law in California.

## I. Question Presented:

Whether the Ninth Circuit departed from the Erie Doctrine, and violated Appellant's due process rights, when it ratified the district court's 12(b)(6) dismissal without leave to amend, disregarding California's required delayed discovery rule analysis in its ruling?

## LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Bayer Healthcare Pharmaceuticals Inc.;

2. Bayer Pharm AG;

3. Bayer Corporation;

4. Bayer Healthcare LLC;

5. McKesson Corporations;

6. McKesson Medical-Surgical Inc.;

7. Merry X-Ray Chemical Corporation.

## RELATED CASES

There are no related cases.

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## V. PETITION FOR WRIT OF CERTIORARI

Appellant, Michael Deuschel, respectfully petitions this court for a writ of certiorari to review the ruling of the Ninth Circuit Court of Appeals.

## VI. OPINION BELOW

The decision by the Ninth Circuit Court of Appeals denying Petitioner's direct appeal is reported as *Michael Deuschel v. Bayer Pharmaceutical Inc, et al*, #23-2600-050, 2:22-cv-08338-HDV-PD (Ninth Circuit App. December 10, 2024). That order is attached at Appendix ("App." At 1-3).

## VII. JURISDICTION

Mr. Deuschel's petition for re-hearing to the Ninth Circuit Court of Appeals was denied on December 10, 2024. He invokes this Court's jurisdiction under 28 U.S.C. §1254(1), having timely filed this petition for a writ of certiorari within ninety days of the Ninth Circuit Court of Appeals' denial.

## VIII. CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth, Seventh and Fourteenth Amendments to the United States Constitution guarantee citizens' rights to due process under law, including the right to an unbiased tribunal, and a trial by jury. The California Constitution's Article 1, Section 7 and Section 24 similarly guarantee due process and equal protection.

Article III, Section 2, Clause 1 of the U.S. Constitution and the Erie Doctrine involves a complex interplay with the Constitution and federal law, and addresses the balance of federal power and state sovereignty.

## IX. STATEMENT OF THE CASE

This case presents the question of whether the Ninth Circuit Court of Appeals, when sitting in diversity, violates the Erie Doctrine when it does not apply California's state law for delayed discovery rule analysis when it is pled and if they violate an Appellant's State and Federal due process when they deny him the right to amend?

In 2024, the Ninth Circuit ratified the District Court's grant of Bayer's first and only Rule 12B6 motion on statute of limitations grounds because it concluded Mr. Deuschel's 2013 medical negligence complaint against Kaiser Permanente meant a product defect claim against Bayer had also accrued no later than 2013.

This ruling improperly treats knowledge of any wrongdoing as knowledge of all wrongdoing, for the purpose of accruing disparate causes of action under the applicable state statutes of limitations.

This is contrary to settled law in California.

The 'rule' for accruing all possible causes of action when the first is discovered is known as the rule of 'imputed simultaneous discovery of causes of action.' This rule, sometimes referred to as the BMS rule, originated from a Fourth District case out of San Diego, *Bristol-Myers Squibb Co. v. Superior Court* (1995) 32 CA4th 959.

Subsequently, *Fox v. Ethicon Endo-Surgical, Inc.* (2003) 112 Cal.App.4th 1572, a Fifth District case, determined that delayed discovery of a product defect claim should not have been analyzed under BMS's bright line rule of 'imputed simultaneous discovery of causes of action', but rather, under facts and circumstances relevant to that claim where, as here, the plaintiff has alleged facts explaining why he did not

have reason to discover earlier the factual basis of his products liability claim, separate and apart from his timely filed medical negligence claim, and that he may amend as necessary to do so.

*Ethicon's* petition for review was granted and the California Supreme Court subsequently ratified the lower court's disapproval of the Bristol-Myers' bright line rule. *Fox v. Ethicon Endo-Surgical, Inc.* (2005) 35 Cal4th 797. Thereafter, California law requires the delayed discovery rule analysis be applied separately to distinct causes of action whenever delayed discovery is pleaded.

In 2024, to ratify the District Court's grant of Bayer's Rule 12B6 motion on statute of limitations grounds, the Ninth Circuit Court of Appeal disregarded Bayer's controlling 2007 FDA-Approved Black-Box warning-definition, Petitioner's 2014 adverse arbitration ruling, and his physicians' 2009 to present refutations of his inquiries of GBCA injury.

The Ninth circuit misapplied hindsight to rule against Petitioner. The Appellate Court ignored Bayer's massive misinformation campaign, that no individual could overcome, which actively concealed the information Petitioner needed to discover the product defect claim. Instead, they applied contemporaneous facts to the past, information unknown from 2009 to 2019, to erroneously conclude Petitioner could have discovered the claim by a reasonable investigation. Yet, from 2010 to 2018, he had conducted extensive investigation but was thwarted, obstructed and denied at every step.

The Ninth Circuit addressed the Erie doctrine in *In re County of Orange*, 14-72343 (9th Cir. 2015), concerning pre-dispute jury trial waivers. The Ninth Circuit upheld the Erie doctrine, ruling that federal courts in diversity cases must apply state law to determine the validity of pre-dispute jury trial waivers when that state law is more protective of the jury trial right than federal law.

Contrarily, in its ruling below, the Ninth Circuit effectively denied Petitioner the fundamental right to due process when it violated the Erie Doctrine, failed to apply state law and deprived him of leave to amend.

**2. The Medical Issue: Petitioner was poisoned but denied a diagnosis**

On June 12, 2009, Petitioner received an injection of 15cc of Bayer Pharmaceutical's Magnevist. It belongs to the class of drugs known as Gadolinium-based contrast agents (GBCAs) that enhance Magnetic Resonance Images (MRIs).

Upon receiving the injection, Petitioner experienced immediate discomfort but the Radiologist dismissed it as "normal." Then, within hours, he experienced renal failure and had to return to the hospital's emergency room for treatment. He was hospitalized for a week due to debilitating pain and injuries.

For nine years, 2009 to 2018, Petitioner's treating physicians at twelve prominent medical centers including Kaiser Permanente Woodland Hills, Los Angeles, Oakland, Redwood City; University of California Medical Centers in San Francisco (UCSF), Los Angeles (UCLA), Irvine (UCI), San Diego (UCSD); Stanford Health; Cedars Sinai; University of Southern California (USC); and Loma Linda University and from nine disciplines including their endocrinologists, dermatologists,

primary care providers, nephrologists, neurologists, orthopedists, radiologists, rheumatologists and toxicologists denied he suffered any injury attributable to Magnevist.

Meanwhile, ten of his eleven body systems were injured. He received about one hundred procedures to treat the injuries. The injuries continued but he had no diagnosis for the destruction. He currently requires sixteen more surgeries.

**3. The Drug Warning Issue: Bayer's 2007, 2010, 2018 defective FDA-Approved revised warnings delayed Mr. Deuschel's discovery**

After his 2009 injury, Petitioner stopped receiving GBCAs, but he continued to receive MRIs without contrast and other imaging and consulted the various attending radiologists. They continued to apply the controlling 2007 FDA-Approved revised warning and denied he was injured by Magnevist.

In 2012, he sued Kaiser Permanente for medical negligence. A legal medical expert was retained. In 2014, his expert testified to Kaiser's negligence—not Magnevist's defectiveness. The drug does not have to be defective for it to be harmful to a patient. The quantity of the drug, the duration of its residency or patient intolerance all contribute to toxicity. Here, the contraindicated drug inflicted the toxic effect because of its duration of residency. Petitioner could not discharge it due to renal impairment—his intolerance placed him at risk of injury—and physicians diagnosed his reaction as an allergic reaction.

Kaiser refuted the NSF diagnosis based upon the legally and medically controlling 2007 FDA-Approved Black-Box warning-definition of risk range and diagnostic criteria. It claimed only patients with severe renal impairment, CKD4/5,

were at risk of NSF—the only recognized disease. As Petitioner had moderate renal impairment, CKD3, he was excluded from the warning and legally and medically denied the NSF diagnosis.

In 2014, the Arbitrator ruled against Petitioner's expert, against his NSF diagnosis, and against his medical negligence complaint. From 2014 to 2018, his new physicians at the UC medical centers and Cedas Sinai continued to refute he was injured by Magnevist. Yet, patients began to tell their stories about GBCA poisoning.

In February 2018, Petitioner read an article and saw interviews of celebrities Chuck and Gena Norris. Ms. Norris was poisoned by a similar GBCA, MultiHance. They sued its manufacturer, Bracco, for defective drug and warnings. Their article made Petitioner suspect Magnevist is defective, too.

Petitioner dug deeper. In July 2018, he discovered Bayer's third FDA-required revision responding to the FDA's December 2017 shocking admission: The toxic heavy metal, Gadolinium, not only crosses the blood-brain barrier but deposits in patients' brains, bones, and other organs in all patients of all levels of renal performance.

Yet, from 2018 to the present, for the last seven years, the FDA falsely denies any evidence of "harm" from the retained Gadolinium, despite published research and patient-evidence to the contrary. As he discovered in 2019, its own medical reviewer warned toxic Gadolinium harms patients.

In February 2019, eight years after its publication, he discovered the second FDA-required revision to Magnevist's warning. It was dated December 20, 2010, one

and a half years after he was poisoned. Implemented in an unusual manner, it was divided into two parts, and not added to the Black-Box warning label.

The FDA required Bayer to "provide" a "Safety Announcement," without defining how to provide it to patients. It contained, "Information for Patients," but was not publicly published for patient access. It stated patients with renal impairment are at risk of injury from GBCAs, without the previous CKD4/5 restrictions. It advised physicians to test patients' renal performance prior to injection, which was not required in 2009, when Mr. Deuschel was poisoned but failed to clarify the risk or the potential injuries.

Petitioner then discovered a separate, second December 2010 document that contained the second component of the FDA-required revision. It was titled, 'Prescription Warning." It was placed in the packaging cartons of the prescribed GBCA drug. It was not given to patients but to pharmacists and presumably radiologists. It was in this second document that Bayer added the FDA mandated warning that patients with moderate renal performance, CKD3, were indeed at risk of injury and could contract NSF.

This atypical revision was not placed in the graphically prominent, controlling Black-Box label warning-definition on the front page but on the fourth page. Subsequently, not one physician, arbitrator, judge, or lawyer disclosed it to Petitioner during the eight years from 2011 to 2019.

From 2011, forward, Pharmacologists and Radiologists must have seen the revision. It established the first 2007 revised warning was defective. Yet, from 2011

to the present, neither they or any other physicians revealed it to Petitioner, at any time, at any of the twelve prominent medical centers, by any of the practitioners of the nine involved medical disciplines during the one hundred procedures.

Petitioner and his 2014 Kaiser arbitration attorneys did their due diligence and did not find it. Three years of research starting in 2011 did not yield discovery of the two-part December 2010 revised warning. Of course, by the time he discovered it, in 2017, Bayer and the FDA had already admitted the 2010 revision was defective by its 2018 revision—just like their 2010 revision demonstrated the 2007 revised warning was defective.

Bayer, a foreign drug-maker, denied the risks while they poisoned Americans for profit. Meanwhile, the controlling governmental, legal and medical authorities misled Petitioner to believe he had not been poisoned by the GBCA Magnevist.

The delayed-discovery rule may be applied in product-liability cases, since the statute of limitations clock may not begin to run until plaintiff suspects that a product defect caused their injury. Indeed, "if a plaintiff's reasonable and diligent investigation discloses only one kind of wrongdoing when the injury was actually caused by tortious conduct of a wholly different sort, the discovery rule postpones accrual of the statute of limitations on the newly discovered claim." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 813.)

The delayed-discovery rule has been codified by C.C.P. section 338(d) in cases involving fraud, and accrual of the three-year statute of limitations occurs upon "the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." If

the defendant actively took steps to conceal the nature of the wrongdoing, plaintiff may use the doctrine of fraudulent concealment in combination with the delayed-discovery rule to further extend the statute of limitations.

Where defendant fraudulently concealed facts that would have led plaintiff to discover a potential cause of action, the cause of action is tolled until plaintiff actually discovers, or, is put on inquiry notice of the fraud. (*Community Cause v. Boatwright* (1981) 124 Cal.App.3d 888, 900-902.) In *Regents of University of California v. Superior Court* (1990) 20 Cal.4th 509, 533, the court held: "The doctrine of fraudulent concealment, which is judicially created, limits the typical statute of limitations. The defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations... In articulating the doctrine, the courts have had their purpose to disarm a defendant who, by his own deception, has caused a claim to become stale and a plaintiff dilatory." (Quotations, citations omitted). Similarly, where defendant intentionally conceals their identity, they may be equitably estopped from asserting the statute of limitations. (*Bernson v. Browning-Ferris Indus. of Calif., Inc.* (1994) 7 Cal.4th 926, 936-937.)

**4. Direct Appeal**

On direct appeal, Petitioner argued that he was denied due process. The Ninth Circuit ratified the District Court's dismissal. The Ninth Circuit ruled that Petitioner should have suspected he was poisoned by Magnevist's defect as early as 2013. Yet, the court did not address the delayed discovery argument as detailed in the SAC, that it was the defect that was late discovered, not the manufacturer's identity. Instead,

the Ninth Circuit conflated defect with identity and denied Petitioner the right to amend or even oral argument. Petitioner requested a review and an En Banc hearing, to challenge the oversight. He was denied on December 10, 2024.

## X. REVIEW OF THE COURTS' ACTION

### 1. Rulings Below

The District Court stated:

> "The Court finds that, even accepting Plaintiff's allegations as true for purpose of this motion, Plaintiff had actual or constructive knowledge of his claim by 2013 at the latest when he received two separate medical opinions identifying Magnevist as the cause of his injuries. For this reason, Plaintiff's claims are all time-barred. Defendants' [sic] Second Amended Complaint is dismissed without leave to amend." (Order, p. 2, ln 13-17.)
>
> "By 2013, Plaintiff received two medical opinions stating that his symptoms were due to the June 2009 injection of Magnevist, SAC ¶ 124. Based on this Plaintiff pursued a claim for negligence against Kaiser Permanente based upon the allegation of "gadolinium toxicity" from Magnevist use. "SAC ¶ 125.' (Order, p. 3, line 9-12.)

The Ninth Circuit stated:

> "Deuschel knew or should have suspected that his injury resulted from Magnevist when two medical professionals told him, in 2013, that his symptoms were related to the Magnevist injected into his body for a procedure ... Deuschel did not proffer any additional facts that would avoid the statute of limitations bar, and the Court correctly determined that amendment would have been futile."

In *Clark v. Baxter Healthcare Corp.* (2000) 83 Cal.App.4th 1048, the plaintiff nurse sued a latex glove manufacturer. The court found that her cause of action did not necessarily accrue when she first experienced allergic reactions due to wearing the gloves. At that time, plaintiff had no reason to believe she had anything more than a natural allergy. Instead, her action accrued when she had reason to believe

her injury could be caused by a manufacturing defect or other wrongdoing by defendants, such as allergies attributable to the manufacturing process of the gloves. (*Id.* 1058-1060.)

**2. The Ninth Circuit's ratification of this dismissal is inconsistent with the Erie Doctrine**

The omitted facts include the qualifying elements of his delayed discovery of the third element of his cause of action, namely, discovery of the wrongful pharmaceutical defect cause of his injuries.

The Ninth Circuit ratified the District Court's misapplication of California's delayed discovery rule analysis. Furthermore, Delayed Discovery presents issues of fact for the jury determination. Petitioner had a fundamental due process right to present to a jury his argument that the defect was late discovered and that his timing satisfied the law in California.

**3. The Ninth Circuit's ruling undermines Federal Policy**

1. The controlling FDA 2007 warning-definition for risk range and diagnostic criteria excluded Petitioner. It stated that only patients with severe renal impairment, CKD4/5, are at risk of injury and can contract only one disease, NSF. Petitioner was CKD3 and therefore excluded and the controlling 2007 warning-definition nullified his suspicion.

2. In the 2014 Kaiser binding arbitration findings, the Arbitrator ruled Mr. Deuschel was not harmed by the Magnevist because he was excluded from the legally and medical controlling 2007 FDA warning-definition. The ruling nullified any suspicion about Magnevist.

The District Court cited the arbitration and even allowed Respondents to submit arbitration documents which omitted the critical fact that the arbitrator had ruled against petitioner's expert's opinion and found Petitioner was not injured by the GBCA, Magnevist. The Ninth Circuit ruling disregarded the Res judicata and collateral estoppel effects that Magnevist was not the cause.

3. The medical authority that nullified Petitioner's suspicion: From 2009 to the present, Petitioner's treating physicians medically refuted his inquiries into the cause of his injuries. Twelve prominent medical centers and nine disciplines of treating physicians during about a hundred procedures insisted Magnevist did not harm him. The Ninth Circuit contradicted the public policies of the Center for Medicare and Medicaid Services (CMS), as well as the Affordable Care Act (ACA) by failing to consider these points.

**4. The Ninth Circuit denied Petitioner oral argument and right to amend:**

The Ninth Circuit denied Petitioner oral argument to contest the District Court's dismissal. The Ninth Circuit violated the Erie Doctrine when it failed to apply California's Delayed Discovery Rule Analysis, denied him access to a trial by jury for delayed discovery, contradicted facts contained in the SAC, and denied him the right to amend and thereby violated Petitioner's Constitutional right to due process.

## XI. REASONS FOR GRANTING THE WRIT

**1. To protect Constitutional safeguards including the Erie Doctrine and due process by addressing the contradictions and inconsistencies of the Ninth Circuit's rulings:**

**i. The Erie Doctrine Precedent**

To prevent forum shopping and to protect the balance of state and federal power, the Erie Doctrine states that when a federal court hears a case based on diversity, it must apply the substantive law of the state in which the case arose, meaning that federal courts must apply state law to substantive issues rather than create their own federal common law situations. *Erie Railroad Co. v. Tompkins* 34 U.S. 64 (1938)

The Ninth Circuit Court violated the Erie Doctrine when it failed to apply California's law to analyze and apply the delayed discovery facts pled by Petitioner.

The U.S. Supreme Court addressed the Erie doctrine in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). This case involved a conflict between state and federal law regarding jury verdicts. The Supreme Court of the United States further refined the Erie doctrine regarding when and how federal courts are to apply state law in cases brought under diversity jurisdiction. The Court held that the New York state rule applied. The Court vacated the judgment of the Second Circuit and ordered the case remanded to the district court for a new trial so that trial judge could test the jury's verdict against the state standard.

In *AIG Centennial INS. v. Jane Fraley-Landers*, No. 05-2918 (8th Cir. 2006), the 8th Circuit ruled that it could depart from a state's highest court ruling. In a civil case matter of insurance, Arkansas law does not require any showing of prejudice to the insurer when the insured fails to give the insurer notice of a loss, and the giving of notice was made a condition precedent to coverage

In *Shady Grove Orthopedic Associates, P. A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010), the Supreme Court addressed the application of the Erie doctrine in the context of class action litigation, emphasizing that federal courts must follow state law in diversity cases.

In *American Safety Casualty Insurance Co. v. City of Waukegan*, 776 F. Supp.2d 670 (Seventh Circuit: N.D. Ill. 2011), the Seventh Circuit essentially ruled in favor of the Erie Doctrine by applying Illinois state law to determine the "occurrence" time for a malicious prosecution claim under an insurance policy, demonstrating their commitment to applying the appropriate state substantive law in a diversity jurisdiction case as per the Erie Doctrine.

In *Carlene Craig v. FedEx Ground Package System*, No. 10-3115 (7th Cir. 2015), the Seventh Circuit ruled in accordance with the Erie Doctrine by essentially applying state law to determine whether FedEx drivers should be classified as employees or independent contractors, effectively deciding that the outcome of the case hinged on how the state court would interpret the relevant state statute; this aligns with the Erie Doctrine's principle of applying state substantive law in diversity jurisdiction cases. The court decided to certify a question to the Kansas Supreme Court to get definitive guidance on how Kansas law would classify the drivers, demonstrating their commitment to applying the appropriate state law.

In *Garcia v. Chiquita Brands International,* No. 21-10211 (11th Cir. 2022), the 11th Circuit ruled Colombian law should apply in a class action case, not U.S. federal

law. The court relied on the Erie doctrine, which provides that state laws on the tolling of a statute of limitations control in a diversity jurisdiction case. (*Garcia* at 7.)

The Seventh and Eleventh Circuit Court of Appeals rule in accordance with the Erie Doctrine but the Eighth, and herein, the Ninth Circuit Court of Appeals ruled contrary to the Erie Doctrine.

The delayed-discovery rule particularly applies to product-liability cases, since the statute of limitations clock may not begin to run until plaintiff suspects that a product defect caused their injury. Indeed, "if a plaintiff's reasonable and diligent investigation discloses only one kind of wrongdoing when the injury was actually caused by tortious conduct of a wholly different sort, the discovery rule postpones accrual of the statute of limitations on the newly discovered claim." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 813.)

For example, a plaintiff injured during surgery may be imputed with knowledge of medical malpractice by the surgeon but not of a products-liability claim against the manufacturer of an implanted medical device. Under those facts, if plaintiff's reasonable and diligent examination does not reveal the basis for the product liability claim, its accrual is delayed until plaintiff has a reason to suspect the injury resulted from the defective product. (*Id.* at 813-815.)

In other matters of law, California has a strong anti-SLAPP statute (Code Civ. Proc. § 425.16 et seq.) designed to protect free speech and petition rights by allowing defendants to strike lawsuits that are brought to chill such activities. The Ninth

Circuit historically has allowed litigants to use California's anti-SLAPP statute in federal courts but not so for delayed discovery of a pharmaceutical injury.

In cases involving delayed discovery of a pharmaceutical injury, California law allows for a longer statute of limitations to begin running, as the injury may not be immediately apparent. The Ninth Circuit's failure to apply California's delayed discovery rule in this specific context could mean that plaintiffs in federal court might face shorter limitations periods than they would in state court, potentially hindering their ability to pursue claims.

The Ninth Circuit's approach raises questions about the application of the Erie doctrine, which dictates that federal courts in diversity cases must apply state law. In pharmaceutical injury cases, the delayed discovery rule is often used when the effects of a drug are not immediately apparent, or when the link between the drug and the injury is not clear until later.

This discrepancy between Circuit Courts of Appeals could have significant implications for pharmaceutical injury cases, potentially leading to inconsistent outcomes and undermining the intended protections of California's delayed discovery rule. The Ninth Circuit's decision could lead to a situation where the same case, if filed in state court, would be subject to a longer statute of limitations than if filed in federal court, creating a potential for forum shopping.

The Ninth Circuit's ruling undermines the intent of Congress. In 2009, the U.S. Supreme Court acknowledged that the FDCA did not mean to pre-empt states from finding that additional steps are appropriate to protect its citizens. Congress intended

that state law serve as a supplement to its FDA oversight. Herein, the Ninth Circuit ruling debased a crucial state function. *Wyeth v. Levine*, 2009.

### ii. The California's Delayed Discovery Rule Analysis Precedent

Can Petitioner sue nine years after he was poisoned—particularly when it was defendants' fraudulent acts of concealment that delayed discovery? Yes, because the Ninth District and Circuit Courts sitting in diversity had a duty to apply California law for delayed discovery.

From 2009 to 2018, for nine years, Petitioner's legal and medical inquiries were repeatedly rejected and he was erroneously excluded from a diagnosis by the controlling 2007 FDA-Approved warning-definition of risk range and diagnostic criteria for the only acknowledged injury from the prescribed drug, Magnevist, namely, NSF.

This scenario could have changed after December 2010 when the FDA required Bayer to revise the warning again but Bayer concealed its revision in a suspect manner. Unlike the 2007 revision, the 2010 warning was not, "controlling," and did not become a warning-definition. No one knew about it nor applied it at any time to Petitioner during his extensive medical treatment.

Instead, all practitioners used the 2007 controlling warning-definition as the legal-medical standard that continued to exclude Petitioner up to the present. This anomaly was due to the atypical 2010 two-part revision that included the "Information for Patients," and, "Prescription Warning," but stayed dormant in the

shadows of concealment and did not become operative let alone, "controlling," as a Black-Box warning-definition that could have served the public, if made public.

Petitioner exercised due diligence, particularly during the Kaiser arbitration, and thereafter, but he could not have learned about the pharmaceutical defect cause/contribution to his injuries, which is the third element of the defective drug and warning cause of action, before 2019, due to Bayer's defective warnings and arbitrator and physician refutations.

The Ninth Circuit ignored facts alleged within his SAC as to why Petitioner could not have learned of the Magnavist defect (third element of his cause of action), until 2018/2019, as well as the facts that explained what he finally did discover in 2018-2019 that provided him with his third element of his defective drug and warning cause of action, namely, the pharmaceutical defect claim.

After nine years of being legally and medically rebuffed, Petitioner learned new facts, including the previously undisclosed Bayer 2010 revised warning, that established, contrary to previous legal and medical claims, Petitioner, medically classified as CKD3, was indeed at risk of injury and contracted NSF.

The Ninth Circuit based its rationale for dismissal on a medical negligence decision from 2014, though its defeat legally assuaged Petitioner's suspicion. If the 2010 revised FDA warning-definition had been known, the Arbitrator could not have defensed the medical negligence action and Petitioner could have subsequently sued Bayer for its defective drug and warnings by February 2015 but that is fiction.

The Ninth Circuit ratified the dismissal without comment on delayed discovery, despite facts alleged in Petitioner's SAC. Petitioner is presumed to have been denied due process when the Court abuses discretion and denies him due process of proper legal analysis.

### iii. The Legal Precedents

The Ninth Circuit's ruling disregarded the res judicata effect of the Kaiser arbitration's defense result which effectively dissuaded further inquiry into the potential contribution of Magnavist. Judicial rulings assuage patients and plaintiffs of their suspicions in the same manner that contrary expert witness opinions do. *Eidson v. Medtronic, Inc.,* 40 F.Supp.3d 1202, 1218-1219 (2014 N.D. Cal)

The 2014 Kaiser Permanente mandatory binding arbitration; In May of 2015, the multi-district litigation, *MDL-1909,* 1:08-gd-50000 (Ohio 2015); in December of 2017, the FDA MIDAC committee; in August of 2019, the District Court case *Davis v. McKEsson Corp., et al.*, CV-18-1157 (1159) (17780)-PHX-DGC, contended NSF is the only disease caused by GBCAs, and, only patients with CKD4/5, can sustain the only contractable disease, NSF. Yet, these rulings omitted the 2010 revised warning's second part, "Prescription Warning," from their analysis, comments and rulings.

In 2019, the District Court in Arizona, in case *Davis v. McKesson Corp., et al.*, #CV-18-1157 (1159) (17780)-PHX-DGC, relaxed the restrictive diagnostic criteria to simply, "renal impairment."

In 2024 in *Geiss v. Bayer Healthcare Pharmaceuticals Inc.*, #CGC-16-554875, #3:17-cv-07026, #20-1144, Defendants attempted to remove the state case to federal

court but the U.S. Supreme Court sent it back. Whereas, herein, Defendants removed the case to federal court while Petitioner was severely ill from Gadolinium Toxicity.

In September of 2024, the Ninth Circuit failed to distinguish between Petitioner's 2014 medical malpractice action and his 2019 defective drug and warning delayed action and claimed he should have known he was injured by Magnevist in 2013—contrary to medical and judicial state and federal authorities—and ratified the dismissal of his case, thereby violating Federal Arbitration Act (FAA) public policies.

**iv. The Medical Precedents**

Does a nine-year tsunami of medical concealment nullify a patient's suspicion? A jury should decide.

The Ninth Circuit's ruling defies nine years of treating physicians and a plethora of past published research that misdirected any possibility for suspecting product defect.

The rulings below are plain error. The rulings contradict the state law for delayed discovery and facts contained in Petitioner's SAC that pertain to medical diagnoses and refutation and violates the public policies of the FDA, CMS and ACA

The rationale of delayed discovery is that patients are at a disadvantage due to the complexity of, and access to, medical information. Patients are vulnerable and dependent on physicians, and subject to the power differential inherent in the physician—patient relationships. All patients are dependent upon treating physicians for accurate diagnosis and care.

Petitioner cannot be expected to contravene the tsunami of denials to develop or maintain contrarian opinions, especially given the extensive degree—twelve institutions and nine disciplines—and duration—nine years—of diagnostic denials in response to his inquiries into GBCA injuries. California law does not require a victim to overcome such opposition to hold the statute of limitations in abeyance.

**v. The controlling 2007 FDA-Approved warning-definition Precedent**

Can a rogue expert opinion, judicially refuted in 2014, preclude Petitioner from arguing delayed discovery four years later based upon newly discovered facts that establish he was indeed at risk and injured by Magnevist's inherent defect from which he then acquired NSF? No. The single, misinformed, expert opinion should not preclude Petitioner from Constitutional right of due process.

In 2014, Petitioner lost the Kaiser Permanente mandatory, binding arbitration. The arbitrator ruled he could not have been poisoned by Magnevist because he was excluded from the controlling, 2007 FDA approved warning-definition of risk range and diagnostic criteria: Only patients with severe renal impairment, CKD4/5, were considered at risk of injury and susceptible to contracting the only recognized disease caused by GBCAs, namely, NSF. Petitioner, classified with moderate renal impairment (CKD3), was excluded from the defined risk group, denied the NSF diagnosis, and so his claim was defensed.

Courts favor arbitration because it lightens the case load for government courts. To promote arbitration, courts honor the tribunal rulings as lawful. Ten years later, the courts below violated the basic tenet of binding arbitration: future

judges cannot later rule contrary to the binding tribunal's findings. When the courts below determined that Petitioner should have known Magnavist caused his NSF, they ignored the Arbitration result which said Magnavist caused him no harm. The courts below should have recognized such a ruling as a significant impairment to the quest for truth that kept the statute of limitations tolled, particularly in light of Bayer's active concealment of the true facts. Bayer should not benefit from a statute of limitations defense in the presence of such conduct.

**vi. The Ninth Circuit found that Petitioner did not proffer any additional facts in opposition to Bayer's 12b6 motion. However, those facts within his complaint and his second amended complaint were more than enough to justify oral argument and a reversal?**

The Nine Circuit's ruling that, "Deuschel did not proffer any additional facts that would avoid the statute of limitations bar," is only supported by the court's conflating knowledge of manufacturer identity with knowledge of the product's defect. No additional facts would change Petitioner's knowledge that Bayer was the manufacturer. What should have been controlling was Petitioner's allegations that Bayer actively concealed the defect and thereby prevented Petitioner from discovering it until 2019.

Petitioner included numerous facts in his SAC that pertain to the accrual of his action based upon delayed discovery. Regarding his 2014 Kaiser arbitration expert's opinion, it was dismissed by the binding arbitration findings, and Petitioner's suspicion was thereby nullified. The arbitrator ruled the controlling FDA 2007

warning-definition and derived medical standards excluded Petitioner from the risk range and diagnostic criteria.

If his expert's opinion was not dismissed, Petitioner had ample time, if one year remained of his statute of limitation for pharmaceutical liability, as per the Ninth Circuit, to sue Bayer for the injury, but only if he possessed the third element of a defective drug and warning cause of action, namely, the wrongful pharmaceutical cause of injury, which he did not possess until 2019. Petitioner would not have hesitated to sue the drug-maker, if he had known the grounds.

**vii. Facts relating to causation of Petitioner's delayed discovery as contained within his complaint:**

1. Petitioner had suspicion of medical negligence, but not of Magnevist's inherent defect. In the 2014 arbitration, Petitioner alleged the negligent administration of Magnevist poisoned him because of his intolerance to it due to his impaired renal function. Alleging a harmful effect from medical negligence is not equivalent to alleging the drug's defect as a cause of injury, let alone alleging the contraction of the novel disease, GdTox. His treating physicians diagnosed his response to Magnevist as an allergic reaction.

Petitioner's arbitration expert did not identify "Magnevist," as the cause of injury. He identified the negligent administration of the contraindicated GBCA as the cause of injury. As was later discovered, one year earlier, in 2008, the same radiology department assessed GBCAs as contraindicated for Petitioner. On June 12, 2009, the attending radiologist failed to heed the prior entry with tragic results.

2. The 2014 adverse arbitration ruling nullified Petitioner's suspicion. Because Petitioner did not possess the third element of a cause of action, namely, wrongful pharmaceutical cause of his injury, under California's delayed discovery law, his statute of limitation could not have accrued.

3. Petitioner's due diligence could not overcome Bayer's controlling concealment. The District Court asserted he should have investigated more and the Ninth Circuit concurred. It is not that he did not investigate, on the contrary, he dug deeper than is typical and his arbitration is evidence of his extensive investigation.

From 2009 to 2018, physicians argued Petitioner was not injured by Magnevist and did not sustain NSF, the only GBCA-caused disease recognized at the time. Petitioner was dismissed, excluded, obstructed, and refuted for nine years because vital information was concealed by Bayer, with the FDA's approval.

4. GBCA drug-makers piecemealed their disclosures, concealed facts, rejected challenging research as they profited from poisoning patients. The piecemealed revisions of warnings strangled the disclosure of facts patients were entitled to know to make informed decisions prior to injection.

Bayer and the FDA struck out. In 2007, 2010 and 2018, Bayer made partial admissions of Magnevist's toxicity when forced by the escalating number of patient-victims and incriminating research. Bayer's FDA-Approved concealment excluded Petitioner and delayed his discovery of Magnevist's defects.

5. Petitioner did not have knowledge of his pharmaceutical claim until 2019. The courts below assert that Petitioner, "had actual or constructive knowledge of his

claim by 2013, at the latest, when he received two separate medical opinions identifying Magnevist as the cause of his injuries," but this is incorrect.

The courts below conflated smaller case letters with capital letters. Since the time the drug was approved in 1988, researchers employed the terminology, "the toxic effect of gadolinium," and, "gadolinium toxicity." So, Petitioner employed the terms in his arbitration to identify the effects.

Reference to the toxic effect of Gadolinium is distinct from the identification of the novel disease which is identified by capital letters, such as "Gadolinium Toxicity," which has come to be recently abbreviated as "GdTox."

6. Petitioner sustained the toxic effects of gadolinium but was excluded from the NSF diagnostic criteria, and, the disease, "Gadolinium Toxicity" was not yet recognized, not until 2023/2024.

Independent research advanced over time. Understanding of the defective nature of the GBCAs advanced into the public's sphere of awareness, but prior to 2018, patients were not aware of GBCA's toxicity. When the Ninth Circuit Court of Appeals failed to apply the delayed discovery rule analysis, as California law requires for the latter, distinct cause, to the facts actually and not fictitiously available at the time, as Petitioner detailed in his complaint, they violated the Erie Doctrine.

### viii. Facts constituting Petitioner's 2018-2019 delayed discovery as contained in his complaint:

1. The 2018 discovery of the Chuck and Gena Norris' interview triggered Mr. Deuschel's suspicion.

2. The 2018 discovery of the FDA's December 2017 MIDAC revision and Bayer's July 2018 third warning revision demonstrated that the FDA and Bayer manipulated the meaning of, "Harmful."

3. The 2019 discovery of Bayer's concealed December 2010 two-part second warning revision demonstrated that he was indeed at risk of injury and sustained the injury, NSF.

4. The 2019 discovery of Arizona District Court's statement in *Davis v. McKesson Corp., et al.*, CV-18-1157—Renal impairment creates risk of injury—demonstrated the definitions of the risk range and diagnostic criteria were relaxed.

5. The 2019 discovery of the 2015 MDL-1909, 1:08-gd-50000, (Ohio, 2015), demonstrated that CKD4/5 patients had defeated GBCA drug makers and he was wrongfully excluded from legal remedy.

6. The 2019 discovery of new research articles that established GBCA toxicity demonstrated that science can now prove GBCAs are toxic and "harmful" to patients.

**2. In 2018, the FDA required GBCA drug-makers to provide Medication Guides to Patients:**

In 2019, Mr. Deuschel discovered that in 2018 the FDA required GBCA manufacturers to add, "Medication Guides," to their warnings and for radiologists to provide one-page, "Medication Guide," to patients prior to administering GBCAs.

Such "Medication Guides" were not required in 2009.

**3. In 2023, the highest medical authorities created an ICD-10 code for the toxic effect of medically administered Gadolinium**

Since 2019, facts incriminating Bayer and the FDA emerged. In an effort to suppress the information, their resistance increased; self-serving acts to conceal fault. This period is not unlike the Therac-25 and Thorotrast Radiology tragedies.

"ICD" is an acronym for "International Classification of Diseases." The ICD-10, is its tenth revision. It classifies diseases, diagnoses, symptoms, procedures, causes of death and injury. The entire medical industry operates and bills according to it. The international ICD-10 codes are created by the World Health Organization (WHO). The Center for Medicare & Medicaid Services (CMS) and Center for Disease Control and Prevention (CDC) create the U.S. ICD. The American Medical Association (AMA) provides resources to help physicians understand the codes.

On March 8, 2022, CDC's ICD-10 Coordination and Maintenance Committee Meeting advised, on "Gadolinium Toxicity,"

> "This toxicity can manifest itself in various symptoms and effects on the body including but not limited to central nervous systems, including impairment of the cognition, memory, impairment of sight, painful tinnitus, and pseudoangioedema. Additional manifestations can include impaired voice and pharyngeal swallowing mechanisms, cardiac arrythmias, changes in blood pressure, impaired function of the gastrointestinal tract and urinary system. Symptoms can be mild in some patients, while others develop severe life-threatening illness similar to cytokine storm response.
>
> "Additional rationale as to why a new code is being requested includes: to ensure gadolinium toxic patients are recognized, diagnosed properly, treated appropriately and timely in order to prevent progressive disease and damages in the human body that is caused by gadolinium toxicity."

On October 1, 2023, they created the ICD-10 code for the new disease iatrogenic Gadolinium Toxicity to include cases where it is medically induced by MRIs using GBCAs: T56.82.

Also, in October 2023, Petitioner's treating orthopedic surgeon Timothy Crall, MD, of Mammoth Lakes Orthopedic Institute, kindly biopsied Mr. Deuschel's pelvis. He sent the harvested bone sample to Doctor's Data Lab for analysis. The results established toxic Gadolinium—from one 15cc injection of Magnevist administered 15 years earlier—remains in Petitioner's bones.

October 2024, the CDC created the new code for the sequela of GdTox symptoms, T56.821S.

From all the brain, spine and other surgeries he received, the collected samples should have been timely tested but he was denied testing and appropriate, timely treatment for fifteen years because he was denied a diagnosis.

Petitioner's claim is timely and his prophetic drug defect cause of action is supported by facts the Ninth Circuit omitted and did not let him orally argue or review. Now, his action is irrefutably supported by the highest medical authorities: GdTox is a disease and has been assigned an ICD-10 code.

Patients are not expected to know more than physicians; patients place their lives in their doctors' hands. The public places its trust in state and federal authoritative agencies. Now, it is shown: those physicians and agencies failed the public.

The courts below claimed patients should have known better and earlier than their physicians and the governing agencies. The Courts below violated the Constitution and federal doctrine when they denied Petitioner the right to amend and and a review and thereby suppressed his meritorious challenge. The GBCA controversy constitutes a crisis that the FDA and GBCA drug-makers caused and lower courts failed to rectify.

**4. Judicial bias cries out for review**

For over fifteen years, since June 12, 2009, Petitioner's true diagnosis has been denied and manipulated. On either an individual or class basis, such deprivation has grave consequences for public health and judicial policy and access to appropriate, timely care and justice. Because NSF/GdTox is Petitioner's primary disability, the deprivation of his diagnosis is a violation of his civil rights under the Americans with Disabilities Act (ADA).

There exists an analogous as well as causal relationship between Petitioner's medical and legal status. In the respective sectors, he has been deemed unworthy of full services in direct violation of the administrative and judicial rules as well as public policies of the ACA, ADA and CMS.

Petitioner was rendered permanently disabled by NSF/GdTox and lost everything. As an unhoused, indigent, untreated person, his quality of life deteriorated because the California medical service industry, dominated by Kaiser Permanente and the UC Regents Medical Centers, repeatedly deprived him of appropriate, timely services.

Magnevist injured ten of his eleven body systems. He required more than one hundred procedures. Due to Medi-Cal corruption, surgeons often declined to accept it to treat him. He was often told as an Adaptive person with disabilities, especially without a diagnosis, he did not deserve treatment, not according to "Qualys."

Qualys stands for "Quality-Adjusted Life Years," a foul inversion of physicians' ethical duty to help patients maintain and restore their, "quality of life." Qualys discriminate against Adaptives and falsely claim Adaptives exist at a lower quality of life than "Enabled" patients and are therefore less deserving of care. It attacks healthcare equality and California practices it with fervor.

The average delay in surgeries is not counted in weeks or months but years. The average delay for Petitioner is five years, and, he must travel thousands of miles throughout California to beg for the prescribed surgeries.

Whereas, the law mandates treatment within six to eight weeks and within thirteen miles of one's residency.

Currently, he fights for sixteen surgeries: bilateral shoulder and hip surgeries denied for twelve years; for bilateral elbow surgeries denied for ten years; for thoracic spinal cord surgery denied for eight years; for the cervical spine surgery denied for five years; for the lumbar spine surgery denied for four years; for neurostimulator surgery denied for six years; for oral surgeries and treatment denied for six years; for the bilateral wrist surgeries denied for five years; for bilateral thumb surgeries denied for five years; for right foot bunion surgery denied for four years.

The respective legal and medical industries concealed facts that established Petitioner's real diagnosis and thereby denied him care and justice, alike. The medical denial of prescribed surgeries and the judicial denial of justice are both related to the denial of a diagnosis. The judicial system discriminated against him, as an Adaptive, indigent person with disabilities. Herein, and in a closely related case, *Michael Deuschel vs. the California Health and Human Service Agency*, #24-3129, #3:23-cv-03458-MMC, the Court below telegraphed its bias that informed its dismissals. The bias-driven deprivation of service is rooted in the Court's disdain for *in forma pauperis* (IFP) plaintiffs.

Despite invoking his right to prosecute a complaint based upon delayed discovery, Petitioner was denied his rights by biased disregard and exclusion based upon false grounds, dismissed by the court long before he ever had his 'day in court.'

Ironically, in both the medical and judicial industries, the authorities invite eligible people to apply for financial assistance but then punish those who accept it, later depriving the recipients of entitled services and rights, alike.

The Court's biased rulings breached the promise of full-equal-fair access to the judicial system for all and created an elitist protocol in which selected, undesired plaintiffs are procedurally pummeled out of court, not by their adversaries but by judges. The judicial strong-arm tactics serves the defendants at the expense of the plaintiff's rights.

The San Francisco District Court and Ninth Circuit Court acknowledged they treat Petitioner, who received a fee waiver, differently, hold him to different

standards of review, and provide less accommodations because the federal courts elected that the ADA does not apply to them.

The rule under the eighth and fourteenth amendments is clear, all citizens are entitled to utilize the full scope of federal judicial services without bias.

## XII. DOES THE OPPORTUNITY FOR CLARIFICATION EXIST HEREIN?

If left to stand, the current ruling erodes the constitutional rights and carefully-crafted procedural safe guards this Supreme Court has developed for nearly a hundred years. In 1938, the U.S. Supreme Court established the Erie Doctrine to protect the sovereignty of the states and balance of state and federal power. *Erie Railroad Co. v. Tompkins,* 1938. In 2009, the U.S. Supreme Court acknowledged that the FDCA did not mean to pre-empt states from finding that additional steps are appropriate to protect its citizens. Congress intended that state law serve as a supplement to its FDA oversight. *Wyeth v. Levine*, 2009.

Petitioner's case presents this Supreme Court with an opportunity to address the Second, Seventh, Ninth, and Eleventh Circuit Courts of Appeals' inconsistency on the constitutional issue of the Erie Doctrine, to clarify the delayed discovery laws, the binding nature of arbitration findings, and binding nature of medical diagnoses and refutations, to reverse bias, and to assist the injured to seek redress for GBCAs' defects and toxicity.

Pharmaceutical corporations are poisoning people for profit and most authoritative bodies are not listening to the people's pleas for help!

From the day the FDA approved Magnevist, the true dangers of GBCAs were concealed. Bayer's FDA-Approved warning-definitions, shown to be defective in 2007, 2010 and 2018, were wrongfully imbued with unassailable authority by the FDA-judicial-medical symbiotic interests. Their strangle-hold wrongfully excluded victims of Gadolinium Toxicity from timely care and justice, alike.

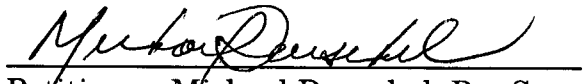
For the last fifteen years, those same FDA-judicial-medical dynamics deprived Petitioner of timely care and justice, too.

## XIII. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the Ninth Circuit Court of Appeal's affirmation of the District Court's biased dismissal.

DATED this 10th day of March, 2025.

Respectfully submitted,



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