SUPREME COURT OF THE UNITED STATES

No. 07–1437

CARLSBAD TECHNOLOGY, INC., PETITIONER *v.* HIF BIO, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[May 4, 2009]

JUSTICE BREYER, with whom JUSTICE SOUTER joins, concurring.

I join the Court's opinion. I write separately to note an anomaly about the way 28 U. S. C. §1447 works. In this case, we consider a District Court's decision not to retain on its docket a case that *once* contained federal law issues but *now* contains only state law issues. All agree that the law grants the District Court broad discretion to determine whether it should keep such cases on its docket, that a decision to do so (or not to do so) rarely involves major legal questions, and that (even if wrong) a district court decision of this kind will not often have major adverse consequences. We now hold that §1447 *permits* appellate courts to review a district court decision of this kind, even if only for abuse of discretion.

Contrast today's decision with our decision two Terms ago in *Powerex Corp.* v. *Reliant Energy Services, Inc.*, 551 U. S. 224 (2007). In that case, we considered a District Court's decision to remand a case in which a Canadian province-owned power company had sought removal—a matter that the Foreign Sovereign Immunities Act of 1976 specifically authorizes federal judges (in certain instances) to decide. See §§1441(d); 1603(a). The case presented a difficult legal question involving the commercial activities of a foreign sovereign; and the District Court's decision (if

wrong) had potentially serious adverse consequences, namely preventing a sovereign power from obtaining the *federal* trial to which the law (in its view) entitled it. We nonetheless held that §1447 *forbids* appellate courts from reviewing a district court decision of this kind. *Id.*, at 238–239.

Thus, we have held that §1447 *permits* review of a district court decision in an instance where that decision is unlikely to be wrong and where a wrong decision is unlikely to work serious harm. And we have held that §1447 *forbids* review of a district court decision in an instance where that decision may well be wrong and where a wrong decision could work considerable harm. Unless the circumstances I describe are unusual, something is wrong. And the fact that we have read other exceptions in the statute's absolute-sounding language suggests that such circumstances are not all that unusual. See *Osborn* v. *Haley*, 549 U. S. 225, 240–244 (2007); *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U. S. 336, 350–352 (1976).

Consequently, while joining the majority, I suggest that experts in this area of the law reexamine the matter with an eye toward determining whether statutory revision is appropriate.