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In The
SUPREME COURT OF THE UNITED STATES
October Term 2018

**Young Adult Institute, Inc.,
d/b/a YAI National Institute for
People with Disabilities,
*Applicant/Petitioner,***

v.

**Joel M. Levy *et al.*,
*Respondents.***

**Application for an Extension of Time Within Which
to File a Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit**

**APPLICATION TO THE HONORABLE
RUTH BADER GINSBURG, AS CIRCUIT JUSTICE**

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December 13, 2018

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APPLICATION FOR EXTENSION OF TIME

Pursuant to this Court's Rule 13.5 and 28 U.S.C. § 2101(c), Applicant Young Adult Institute, Inc. (YAI) hereby requests a 30-day extension of time within which to file a petition for a writ of certiorari, to and including February 1, 2019.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *Levy v. Young Adult Institute, Inc.*, No. 17-1797, --- F. App'x ----, 2018 WL 3773654 (2d Cir. Aug. 9, 2018), a copy of which is attached as Exhibit A.

JURISDICTION

The Second Circuit entered judgment on August 9, 2018. YAI filed a timely petition for panel and *en banc* rehearing on August 23, 2018. That petition was denied on October 4, 2018 (Order attached as Exhibit B). Under Rules 13.1, 13.3, and 30.1 of this Court, a petition for a writ of certiorari is due to be filed on or before January 2, 2019. In accordance with Rule 13.5, YAI has filed this application more than 10 days in advance of that due date. This Court's jurisdiction will rest on 28 U.S.C. § 1254(1).

REASONS JUSTIFYING AN EXTENSION OF TIME

Applicant respectfully requests a 30-day extension of time within which to file a petition for a writ of certiorari seeking review of the Second Circuit's decision in this case, to and including February 1, 2019. An extension is warranted because of the importance of the issues presented and the fact that undersigned counsel were recently retained to prepare the petition.

1. This case concerns the enforceability, under federal common law, of contracts that contravene public policy—specifically, contracts for executive compensation. Applicant YAI operates a network of not-for-profit agencies that provide programs and services for disabled persons. Respondent Joel Levy was YAI’s executive director and CEO until he retired in 2009. In 2011, a series of media reports and settlements related to improper Medicaid billing led YAI’s board of directors to examine the group’s executive compensation, including post-retirement compensation. An outside consultant determined that Levy’s post-retirement compensation of nearly \$17 million had “no justification” and recommended limiting his remaining compensation to a reasonable figure. YAI followed the consultant’s advice in accordance with the clearly expressed preferences of the State of New York.

2. Levy filed suit under the Employee Retirement Income Security Act (ERISA) seeking the payment of additional benefits. YAI defended against these claims on the ground that public policy—as expressed in New York law and the Internal Revenue Code—prohibits a non-profit and tax-exempt corporation like YAI from paying excessive or unreasonable compensation. The district court rejected YAI’s public-policy defense based on a purported distinction between “a contract that violates a regulatory prohibition” and one that violates “a law against something that is inherently wrong such as murder or arson”—a distinction that does not exist under the federal common law that governs such benefit contracts. The Second Circuit affirmed, adopting the district court’s reasoning.

3. The decisions below conflict directly with this Court’s holding in *Kaiser Steel Corp. v. Mullins* that “illegal promises will not be enforced in cases controlled by the federal law.” 455 U.S. 72, 77 (1982). The examples of such contracts *Kaiser* identified did not involve murder or arson, but bid-rigging and antitrust violations, *see id.*—precisely the sort of “regulatory prohibition” the courts below deemed insufficient. And *Kaiser* itself applied the defense of illegality to an ERISA claim, based on violations of the antitrust and labor laws. The essential issue in a contract illegality case is whether enforcing the promise would require “commanding unlawful conduct.” *Id.* at 79. Because that is true here, the Second Circuit’s decision clashes with *Kaiser* and with decisions from other circuits applying it. *See Bassidji v. Goe*, 413 F.3d 928, 938 (9th Cir. 2005) (collecting cases).

4. Undersigned counsel respectfully submit that the extension of time requested here is warranted in light of the importance of these issues. Undersigned counsel were retained to prepare the petition in early December, and thus require additional time to familiarize themselves fully with the case and prepare a petition that will assist the Court in considering these questions. Further, the extension is warranted in light of the holiday season and counsel’s other commitments in December, including a response brief in *Tennessee Wine & Spirits Retailers Ass’n v. Blair*, No. 18-96, a certiorari-stage reply brief in *Kahler v. Kansas*, No. 18-6135, and the oral argument in *Brundle v. Wilmington Trust*, No. 17-1873 (4th Cir.), which took place on December 11, 2018.

CONCLUSION

Applicant respectfully requests an extension of 30 days, to and including February 1, 2019, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,

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