No. 18A-_____

IN THE
SUPREME COURT OF THE UNITED STATES

WALID JAMMAL, KATHLEEN TUERSLEY, CINDA J. DURACHINSKY, AND NATHAN GARRETT,

Applicants,

v.

AMERICAN FAMILY INSURANCE COMPANY, AMERICAN FAMILY MUTUAL INSURANCE COMPANY, AMERICAN FAMILY LIFE INSURANCE COMPANY, AMERICAN STANDARD INSURANCE COMPANY OF WISCONSIN, AMERICAN FAMILY TERMINATION BENEFITS PLAN, RETIREMENT PLAN FOR EMPLOYEES OF AMERICAN FAMILY INSURANCE GROUP, AMERICAN FAMILY 401K PLAN, GROUP LIFE PLAN, GROUP HEALTH PLAN, GROUP DENTAL PLAN, LONG TERM DISABILITY PLAN, AMERICAN FAMILY INSURANCE GROUP MASTER RETIREMENT TRUST, 401K PLAN ADMINISTRATIVE COMMITTEE, COMMITTEE OF EMPLOYEES AND DISTRICT MANAGER RETIREMENT PLAN,

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 SIXTH CIRCUIT

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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 SIXTH CIRCUIT

TO: Justice Sotomayor, Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Applicants Walid Jammal, Kathleen Tuersley, Cinda J. Durachinsky, and Nathan Garrett respectfully request, under Rules 13.5 and 22 of the Rules of this Court, an extension of fifty-nine days within which to file a petition for a writ of certiorari. Their forthcoming petition will challenge the Sixth Circuit's decision in *Jammal v. American Family Insurance Co.*, 914 F.3d 449 (6th Cir. 2019), a copy of which is attached. In support of this application, Applicants provide the following information:

1. The Sixth Circuit issued its judgment on January 29, 2019, and denied a timely petition for rehearing and rehearing en banc on March 25, 2019. App. 26a-27a. Without an extension, the petition for a writ of certiorari would therefore be due on June 24, 2019 (Monday). With the requested extension, the petition would be due on August 22, 2019.

2. This case is a serious candidate for certiorari review because it squarely and cleanly presents an important standard-of-review question on which the courts of appeals are openly divided.

a. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.*, protects "employees" but not independent contractors. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 320-21 (1992). This Court has

held that ERISA and other federal statutes that use the term "employee" must be construed to "incorporate traditional agency law criteria" to distinguish employees from independent contractors. *Id.* at 319. The common-law test focuses on "the hiring party's right to control the manner and means by which the [work] is accomplished" and requires consideration of the totality of the circumstances, including a non-exhaustive list of relevant factors. *Id.* at 323 (citation omitted).

b. Applicants represent a class of current and former agents of American Family Insurance Company. Because American Family purports to classify its agents as independent contractors, its agent pension plan does not comply with ERISA's minimum protections. Applicants contend that despite their nominal independent-contractor status, American Family's pervasive control over their work—which far exceeds industry norms—means that they are in truth employees. They brought this action seeking relief for American Family's failure to administer an ERISA-compliant pension plan. App. 3a.

After a twelve-day trial, the district court found—in agreement with the verdict of an advisory jury—that Applicants are employees. App. 3a-5a. In so doing, the court considered the totality of the circumstances bearing on American Family's control of their work and made detailed findings on the existence and degree of each of the *Darden* factors. *Id.* 8a.

c. The district court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b), and a divided panel of the Sixth Circuit reversed. App. 1a-25a. The panel majority acknowledged that Applicants had presented "significant evidence to

support their claim that American Family treats them more like employees than independent partners." *Id.* 4a. And the majority disagreed "with only a few aspects of the district court's analysis of the *Darden* factors." *Id.* 17a (Clay, J., dissenting); *see id.* 10a n.4 (majority opinion). But the majority nonetheless held that Applicants are independent contractors with no rights under ERISA. *Id.* 15a.

The linchpin of the majority's decision was its holding on the applicable standard of review. Rejecting decisions by other courts of appeals that have "explicitly considered this question," the majority held that a district court's findings on both the ultimate question of employment status and the "existence and degree of each *Darden* factor" must be reviewed de novo rather than for clear error. App. 9a (citing decisions from the Second, Eighth, and Tenth Circuits).

Judge Clay dissented. App. 16a-25a. He emphasized that the majority's standard-of-review holding departed from the decisions of every other court of appeals to consider the question. *Id.* 18a-19a. He also explained that the district court's finding that Applicants are employees should have been affirmed even under the majority's novel de novo standard. *Id.* 20a-25a.

d. The circuits are thus openly divided on the standard of review for a district court's finding of employee status under the common-law test. Indeed, the conflict is broader and deeper than the panel majority realized. *See, e.g.*, *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1493-94 & nn. 8-10 (11th Cir. 1993) (collecting conflicting decisions from six circuits). And the question presented is extremely important: Disputes about employment status are a common feature of ERISA

litigation, and the same question also arises under other oft-litigated federal statutes that incorporate the common-law test—including the Internal Revenue Code, Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.

3. This application is not filed for purposes of delay. Applicants have affiliated with with the undersigned counsel at the Stanford Law School Supreme Court Litigation Clinic for purposes of seeking this Court's review. The extension is needed for undersigned counsel and other members of the Clinic to fully familiarize themselves with the voluminous trial record, the decisions below, and the relevant case law. In light of the Clinic's many other obligations in this Court, including two merits briefs and several certiorari-stage filings due in the next several weeks, the Clinic would not be able adequately to complete those tasks by the current due date. Applicants' other counsel also have substantial professional obligations in the coming months, including dispositive-motions briefing and other pre-trial deadlines in a complex multi-district case, *In re National Opiate Litig.*, MDL No. 1:17-cv-2804 (N.D. Ohio).

4. For these reasons, Applicants respectfully request that the due date for their petition for a writ of certiorari be extended to and including August 22, 2019.

Respectfully submitted this 6th day of June, 2019.

By: _____

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