No. _____

In the Supreme Court of the United States

BAYER HEALTHCARE PHARMACEUTICALS INC., ET AL.,
Applicants,
v.
CURTIS ULLESEIT, ET AL.,
Respondents.

BAYER HEALTHCARE PHARMACEUTICALS INC., ET AL.,
Applicants,
v.
BETH WINKLER
Respondent.

APPLICATION TO THE HON. ELENA KAGAN 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 NINTH CIRCUIT

Pursuant to Supreme Court Rule 13(5), Bayer HealthCare Pharmaceuticals Inc., Bayer Corporation, and Bayer HealthCare LLC (collectively "Bayer") hereby move for an extension of time of 60 days, to and including Monday, July 25, 2022, for the filing of a petition for a writ of certiorari.[1] Unless an extension is granted, the deadline for filing the petition for certiorari will be Thursday, May 26, 2022.

In support of this request, Bayer states as follows:

[1] Bayer HealthCare Pharmaceuticals Inc., Bayer Corporation, and Bayer HealthCare LLC are all indirect subsidiaries of Bayer AG. Bayer AG is a publicly held German stock company, it has no parent company, and no publicly held company owns 10 percent or more of its stock.

1. The United States Court of Appeals for the Ninth Circuit rendered its decision on December 29, 2021 (Exhibit 1) and denied a timely petition for rehearing on February 25, 2022 (Exhibit 2). This Court has jurisdiction under 28 U.S.C. §1254(1).

2. This case presents major issues related to federal jurisdiction. Plaintiff complained that an out-of-state pharmaceutical company, Bayer, should have added an additional warning to the highly regulated label accompanying one of its medicines.[2] To avoid federal diversity jurisdiction and keep the case in state court, she also sued in-state defendants—drug distributors that deliver products to healthcare providers—even though the claims against them were preempted.

3. Bayer removed, explaining that the in-state distributors were fraudulently joined, and thus should be disregarded for diversity purposes, because the claims against them are preempted. *See, e.g.*, *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 185–86 (1907). On appeal, a majority of the Ninth Circuit agreed that Bayer presented "strong arguments" in favor of preemption. Ex. 1 at 4. But it declined to rule that the distributors were fraudulently joined because "doing so would require * * * analytical work" that "exceeds what is permissible in this procedural posture." Ex. 1 at 4–5. In the majority's view, Bayer was required to show that

[2] This appeal initially consolidated five cases. Upon agreement of the parties, the district court decided remand motions in all five cases based on the pleadings and briefing in one case (*Doe*), so that case is the focus of Bayer's analysis. *See* Ex. 3 at 2. Since then, three of the cases were voluntarily dismissed.

the claims against the distributors were preempted based on only a "***summary***" analysis and could not resort to a thorough examination of relevant regulations. *See* Ex. 1 at 3 (emphasis added). Judge Miller dissented, explaining that "[w]hatever analytical work may be necessary to conclude that plaintiffs' claims are preempted, it is not work that anyone should find unduly taxing." Ex. 1 at 8.

4. The Ninth Circuit's rule—that a removing party must demonstrate preemption based on a mere "summary review" of legal materials to show fraudulent joinder—directly conflicts with the Fourth Circuit's decision in *Johnson v. American Towers, LLC*, 781 F.3d 693 (4th Cir. 2015). In *Johnson*, the Fourth Circuit held that an in-state defendant was fraudulently joined because the claims against it were preempted. 781 F.3d at 705. Going far beyond a "summary" inquiry, the court considered statutes, out-of-Circuit authority, and legislative history in resolving the "complex question" of whether claims were preempted by telecommunications laws. *See id.* at 705–06.

The Fourth Circuit's approach is correct. No court except the Ninth Circuit limits itself to a "summary" analysis in deciding whether removal is proper based on a purely legal argument such as the preemption theories found in *Johnson* and this case. The Ninth Circuit's rule originates in, but distorts, Fifth Circuit precedent limiting courts to a "summary inquiry" in evaluating "***facts***" outside a complaint at the motion-to-remand stage—a very different matter from removal theories relying on

purely legal arguments. *See Smallwood v. Illinois Cent. R.R. Co.*, 385 F.3d 568, 573–74 (5th Cir. 2004) (emphasis added).

5. Moreover, this case raises matters of national importance: the Ninth Circuit's ruling means defendants in regulated industries may lose access to a federal forum when courts believe regulations are too complex or novel to permit a "summary" analysis. *See, e.g.*, *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1536 (2021) (considering whether appellate jurisdiction existed to consider arguments that defendants in regulated industries had presented in favor of federal jurisdiction). Courts have highlighted the increasing number and complexity of federal regulations. *See, e.g.*, *Cloverland-Green Spring Dairies, Inc. v. Pennsylvania Milk Mktg. Bd.*, 462 F.3d 249, 252 (3d Cir. 2006) ("Federal and state regulations regarding the sale of milk make 'Byzantine' an apt, and none too pejorative, description."). Not all preemption issues arising from these regulations can be resolved summarily. Under the Ninth Circuit's requirement that preemption be demonstrated using a "summary" analysis, Plaintiffs can thus keep cases in state court by naming non-diverse defendants against whom state-law claims asserted are preempted so long as the analysis is too complex or novel for a court to resolve using a "summary" analysis. That approach is deeply flawed: mere complexity or originality of a preemption issue does not cast doubt on Congress's intention to override state law.

6. Good cause exists for an extension so Bayer's counsel can research the legal issues presented in this case and prepare a petition that fully addresses the

important issues raised by the decision below in a manner most helpful to the Court. *See* S. Ct. R. 13(5). Lead counsel recently returned from maternity leave. In addition, between now and the current due date of the petition, Bayer's counsel anticipates fulfilling substantial obligations in other matters, including completing an opposition brief in *Home Depot USA, Inc. v. Lafarge N. Am., Inc.*, No. 22-1122 (3rd Cir.), preparation for oral argument in *Langara v. Bayer Corp.*, No. 1:20-cv-12001 (D. Mass.), and preparation of a responsive brief in *In Re: Gardasil Products Liability Litigation*, No. 3036 (J.P.M.L.), as well as preparation for depositions and other matters.

7. For the foregoing reasons, Bayer requests that an extension of time to and including Monday, July 25, 2022 be granted within which Bayer may file a petition for a writ of certiorari.

Respectfully submitted,

April 29, 2022

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