

No. ____

IN THE
Supreme Court of the United States

IN RE: ABBOTT LABORATORIES; ABBVIE INC.; ABBVIE PRODUCTS LLC; UNIMED
PHARMACEUTICALS LLC; BESINS HEALTHCARE, INC.,

Applicants.

APPLICATION TO THE HON. SAMUEL A. ALITO, JR.
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
THIRD CIRCUIT

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RULE 29.6 STATEMENT

Neither Applicant Abbott Laboratories nor Applicant AbbVie Inc. has any parent corporation. No publicly held company owns 10% or more of the stock of Abbott Laboratories or AbbVie Inc.

Applicant Unimed Pharmaceuticals LLC is a direct, wholly owned subsidiary of Applicant AbbVie Products LLC, which is a direct, wholly owned subsidiary of AbbVie Inc. AbbVie Inc., which is a publicly traded company, holds 10% or more of the stock of AbbVie Products LLC, and AbbVie Products LLC in turn holds 10% or more of the stock of Unimed Pharmaceuticals LLC.

Applicant Besins Healthcare, Inc. is a wholly owned subsidiary of Besins Healthcare Ireland Ltd., which is a wholly owned subsidiary of Besins Healthcare Holding Pte. Ltd., a Singapore entity. No publicly held company owns 10% or more of the stock of Besins Healthcare, Inc.

To the Honorable Samuel A. Alito, Jr., Associate Justice of the United States Supreme Court and Circuit Justice for the Third Circuit:

Pursuant to Supreme Court Rules 13.5, 22, and 30.3, Abbott Laboratories, AbbVie Inc., AbbVie Products LLC, Unimed Pharmaceuticals LLC, and Besins Healthcare, Inc. (“applicants”) hereby move for an extension of time of 15 days, to and including July 9, 2024, within which to file a petition for a writ of certiorari. The U.S. Court of Appeals for the Third Circuit issued its opinion on February 22, 2024 (Exhibit 1), and issued an order on March 25, 2024, denying a timely rehearing petition (Exhibit 2). Absent an extension, the deadline for filing the petition is June 24, 2024.¹ Applicants are filing this application at least ten days before that date. See Sup. Ct. R. 13.5. This Court’s jurisdiction is invoked under 28 U.S.C. 1254(1).

1. This case concerns the scope of the crime-fraud exception to attorney-client and work-product privilege. That exception vitiates the privilege with respect to “communications ‘made for the purpose of getting advice for the commission of a fraud’ or crime.” *United States v. Zolin*, 491 U.S. 554, 563 (1989) (citation omitted). The exception has historically been narrowly limited to crimes or frauds because, among other things, “no other categorical description of harmful acts provides an equally definite limitation” on the circumstances in which “a lawyer’s duty of confidentiality” ceases to apply. Restatement (Third) of the Law Governing Lawyers § 67 cmt. d.

¹ The date that is 90 days from denial of the rehearing petition is June 23, 2024—but because that date falls on a Sunday, the deadline is extended to Monday, June 24, 2024. See Sup. Ct. R. 30.1.

2. In this case, the Third Circuit denied applicants’ petition for a writ of mandamus to correct a district-court order compelling applicants—who own a patent protecting AndroGel 1%, a drug that treats insufficient testosterone—to produce attorney-client and work-product privileged documents related to applicants’ earlier patent-infringement suit against a generic-drug manufacturer.

The Third Circuit held that “fraud” for purposes of the crime-fraud exception includes *any* “‘wrongdoing’ * * * for an ‘improper purpose,’” regardless of whether that wrongdoing constitutes a crime or a common-law fraud. Ex. 1, at 15 (citation omitted). On that basis, the court of appeals concluded that sham litigation—an objectively baseless suit filed for certain anticompetitive purposes, see *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993)—qualifies as “fraud” that triggers the exception, even absent the factual misrepresentations or reliance that are the *sine qua non* of traditional “fraud.”

The Third Circuit also adopted an onerous test for mandamus relief. For instance, despite this Court’s statement in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), that mandamus should function as a “safety valve[]” to correct “particularly injurious or novel privilege ruling[s],” *id.* at 110-111 (citation omitted), the Third Circuit held that mandamus is unavailable where “no binding precedent * * * squarely” determines whether the privilege applies in the specific circumstances of a particular case, Ex. 1, at 16.

3. The Third Circuit’s decision presents at least two important issues that merit this Court’s review.

First, whether the crime-fraud exception applies to conduct other than crimes

or common-law frauds is the subject of conflict among the lower courts. As the Third Circuit's opinion here implicitly acknowledged, the capacious "wrongdoing undertaken for an improper purpose" standard that the Third Circuit adopted cannot be reconciled with the Federal Circuit's narrower rule, which requires a showing of common-law fraud in order to invoke the fraud prong of the exception. See Ex. 1, at 10 n.6.

The Third Circuit's standard also has serious implications for the attorney-client relationship and thus for the legal system more generally. An amorphous understanding of fraud as constituting essentially any "wrongdoing" leaves clients, their attorneys, and courts guessing at what sorts of communications will fall outside the privilege's protection, thus chilling the "full and frank communication between attorneys and their clients" that is critical to "observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). As this Court has observed, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* at 393.

Second, the Third Circuit's decision sharply restricts the availability of mandamus relief in privilege cases in a way that conflicts with this Court's decision in *Mohawk* and the decisions of other courts of appeals. Before the decision below, the courts of appeals had unanimously held, consistent with *Mohawk*, that mandamus relief is available as to discovery orders addressing novel privilege questions. But that crucial "safety valve[]" is now effectively closed in the Third Circuit. *Mohawk*, 558 U.S. at 111 (citation omitted). And that closure is likely to have harmful effects.

Once privileged material has been disclosed, the bell cannot be unrung, and district courts therefore should not supply the last word on such critical issues.

4. Applicants respectfully request an extension of time to file a petition for a writ of certiorari and submit that good cause exists for such an extension. A short extension of 15 days would allow counsel additional time to research and analyze the issues presented and to prepare a petition for filing. In addition, counsel for applicants have a number of other pending matters in this Court and in other courts, as well as planned international travel in the coming weeks, that will interfere with counsel's ability to file the petition by June 24, 2024.

For the foregoing reasons, applicants respectfully request that an extension of time to and including July 9, 2024, be granted, within which time applicants may file a petition for a writ of certiorari.

Dated June 10, 2024

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Respectfully submitted,
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