No. 25A-

IN THE

SUPREME COURT OF THE UNITED STATES

KARL TOBIEN,

Applicant,

v.

NATIONWIDE GENERAL INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

LOUIS C. SCHNEIDER
THOMAS LAW OFFICES, PLLC
250 East Fifth Street
Ste. 440
Cincinnati, OH 45202

XIAO WANG
Counsel of Record
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903
(434) 924-8956
x.wang@law.virginia.edu

August 5, 2025

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI

TO: The Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, Applicant Karl Tobien respectfully requests an extension of forty-five (45) days in which to file a petition for a writ of certiorari in this case. The U.S. Court of Appeals for the Sixth Circuit issued its decision on April 2, 2025, followed by a minor technical correction on April 4, 2025. *See Karl Tobien v. Nationwide General Insurance Co.*, 133 F.4th 613 (6th Cir. 2025); App. Exh. 2. The Sixth Circuit denied a petition for rehearing en banc on May 19, 2025. App. Exh. 1.

Absent extension, the deadline for filing a petition for writ of certiorari is August 18, 2025. With the requested extension, the petition would be due on October 1, 2025. This application is being filed at least ten days before the petition is due. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). In support of this application, Applicant states:

1. The petition for certiorari in this case will present a question that has produced a deep and persistent split among the federal courts of appeals: Which party bears the burden of proving proper venue?

The court below expressly acknowledged this split, noting that "our sister circuits are . . . divided" on "who bears the burden of proof when venue is challenged

as improper." App. Exh. 2 at 4. As it explained, the Third, Seventh, and Eighth Circuits require the "defendant to prove that venue is improper." *Id.*; *see also, e.g.*, *Myers v. Am. Dental Ass'n*, 695 F.2d 716, 724 (3d Cir. 1982) ("[O]n a motion for dismissal for improper venue under Rule 12 the movant has the burden of proving the affirmative defense asserted by it."); *In re Peachtree Lane Assocs., Ltd.*, 150 F.3d 788, 792 (7th Cir. 1998) ("[T]he party challenging venue bears the burden of establishing by a preponderance of the evidence that the case was incorrectly venued."); *United States v. Orshek*, 164 F.2d 741, 742 (8th Cir. 1947). Moore's Federal Practice Treatise, the panel below observed, also endorses this view. *See* App. Exh. 2 at 4 (citing 17 Moore's Federal Practice § 110.01[5][c])).

In contrast, the First, Second, and Sixth Circuits impose that burden on the plaintiff. App. Exh. 2 at 4–5; *see also Cordis Corp. v. Cardiac Pacemakers*, 599 F.2d 1085, 1086 (1st Cir. 1979) ("It should be noted that there is ample authority placing the burden of so doing on the plaintiff once a defendant has challenged venue by filing a motion to dismiss based on the lack thereof."); *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 355 (2d Cir. 2005) ("If the court chooses to rely on pleadings and affidavits, the plaintiff need only make a prima facie showing of [venue]. But if the court holds an evidentiary hearing . . . the plaintiff must demonstrate [venue] by a preponderance of the evidence."). Similarly, the Fourth and Eleventh Circuits ask the plaintiff to make a prima facie showing as to venue. *See Mitrano v. Hawes*, 377 F.3d 402, 405 (4th Cir. 2004) ("To survive a motion to dismiss for improper venue when no evidentiary hearing is held, the plaintiff need only make a prima facie showing of

venue."); *Home Ins. Co. v. Thomas Indus., Inc.*, 896 F.2d 1352, 1355 (11th Cir. 1990) ("When a complaint is dismissed on the basis of improper venue without an evidentiary hearing, 'the plaintiff must present only a prima facie showing of venue.'") (quoting *DeLong Equipment Co. v. Washington Mills Abrasive*, 840 F.2d 843, 845 (11th Cir. 1988)).

2. As this Court has emphasized, "[w]here the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the . . . litigation." *Lavine v. Milne*, 424 U.S. 577, 585 (1976). That describes the situation here. Applicant's claims would not have been dismissed had the burden to prove venue been placed on Respondent. That is because Respondent did not, in its Rule 12(b)(3) motion, offer any factual evidence as to why venue was or was not improper. Instead, it relied entirely on a legal argument. Had that argument been rejected—as might have happened had this case been brought in the Third, Seventh, and Eighth Circuits—the court below would have applied Kentucky's choice-of-law rules. *See Hanna v. Plumer*, 380 U.S. 460, 465–66 (1965). Under those rules, Kentucky law would govern, and Applicant's claims—one under Kentucky statutory law and one under common law—would likely have gone forward. Instead, the court of appeals here determined that venue was improper, that Applicant should have brought this case in Ohio, and that Applicant's "claims would fail as a matter of Ohio substantive law." App. Exh. 2 at 13.

3. In short, this case presents an important and recurring question upon which the federal courts of appeals are divided. As a result, there is a reasonable prospect that this Court will grant the petition, such that it warrants additional time for these important questions to be fully addressed.

5. Mr. Schneider and the University of Virginia Supreme Court Litigation Clinic are working diligently to prepare the petition, but need additional time to research, complete, print, and file Applicant's petition. The University of Virginia Clinic recently became involved in this case, after the Sixth Circuit issued its decision. Additional time is needed for the Clinic's faculty and staff to fully familiarize themselves with the record, the decisions below, and the relevant case law. In addition, the Clinic is counsel of record for petitioner in *Mumford v. Iowa*, No. 24-1093, and expects to file a reply brief in support of certiorari on or around August 26, 2025.

6. Mr. Schneider is counsel of record in *Cannon v. Blue Cross and Blue Shield of Massachusetts, Inc.* (24-1862) (1st Cir.), where rehearing was denied on May 14, 2025. Mr. Schneider is planning to file a petition for writ of certiorari in that matter. Mr. Schneider also recently completed a civil jury trial, in June 2025, and is the middle of preparing for another civil jury trial that is calendared to begin on August 18, 2025.

In light of these obligations, Applicant's counsel would face significant challenges completing the petition by the current due date. For these reasons, Applicant requests that this Court grant an extension of forty-five days to and

including October 1, 2025, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,

_____/s/ Xiao Wang _____

LOUIS C. SCHNEIDER
THOMAS LAW OFFICES, PLLC
250 East Fifth Street
Ste. 440
Cincinnati, OH 45202

XIAO WANG
Counsel of Record
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
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