

No. 25A168

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

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

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September 19, 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 additional extension of seven (7) 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.

By order dated August 11, 2025, the deadline for filing a petition for a writ of certiorari in this case was extended by 45 days, from August 18, 2025 to October 1, 2025. With the requested second extension, the petition would be due on October 8, 2025, which is 52 days after the original due date. 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 an entrenched 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 outlined, 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 understanding. *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.”). The Fourth and Eleventh Circuits similarly 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. This Court has emphasized that “[w]here the burden of proof lies on a given issue is . . . rarely without consequence and frequently may be dispositive.” *Lavine v. Milne*, 424 U.S. 577, 585 (1976). That describes the situation here. Respondent did not, in its Rule 12(b)(3) motion, offer any factual evidence as to why venue was or was not proper. It relied entirely on a legal argument. Thus, had the burden to prove venue rested on the defendant—as in the Third, Seventh, and Eighth Circuits—it would not have been able to carry its burden and the courts below would have applied Kentucky law to Petitioner’s state law claims. *See Hanna v. Plumer*, 380 U.S. 460, 465–66 (1965). Under Kentucky law, those claims would likely have survived dismissal. 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. In addition to this matter, the Clinic expects to file in October 2025 a petition for writ of certiorari in *Aldridge v. Regions Bank*, 144 F.4th 828 (6th Cir. 2025).

6. Mr. Schneider is counsel of record in *Cannon v. Blue Cross and Blue Shield of Massachusetts, Inc.*, No. 25A147. Mr. Schneider is planning to file a petition for writ of certiorari in that matter by October 11, 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 additional extension of seven days to and including October 8, 2025, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,

_____/s/ Xiao Wang _____

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