No. 13-1015

In The
Supreme Court of the United States

TEVA PHARMACEUTICALS USA, INC.,

Petitioner,

v.

JUDITH ROMO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF THE PETITIONER

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QUESTION PRESENTED

The Class Action Fairness Act of 2005 ("CAFA") authorizes removal to federal court if plaintiffs' claims "are proposed to be tried jointly." The question presented here is whether a motion by plaintiffs to coordinate or consolidate their cases before a single trial judge to avoid inconsistent judgments and promote judicial economy constitutes such a proposal.

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INTRODUCTION

The Ninth Circuit held that the Respondents' request to coordinate forty-one cases involving more than 1,500 personal-injury plaintiffs "for all purposes"—and necessarily through trial—did not constitute a "propos[al]" for these cases "to be tried jointly" and thus was not removable as a "mass action" under the Class Action Fairness Act of 2005 ("CAFA"). 28 U.S.C. § 1332(d)(11)(A), (B)(i). That decision conflicts with decisions from the Seventh and Eighth Circuits, which have held that such coordination requests through trial give rise to "mass action" removal. Although Respondents try to draw factual distinctions among the relevant cases, they cannot explain away what has become a steadily deepening circuit split. When the circuits themselves acknowledge they are in conflict, Respondents are hard-pressed to argue otherwise.

Nor can Respondents seriously contest the importance of the question whether actions that are proposed to be coordinated through trial are removable "mass actions" under CAFA. The removability to federal court of thousands of cases depends on the answer to that question. This is not merely a question of state law, as Respondents maintain. What constitutes a "propos[al]" for claims "to be tried jointly" under CAFA is necessarily a question of federal law. This Court's review is needed to ensure the uniformity of federal law across the circuits on an important question of federal jurisdiction.

Because the Ninth Circuit has already granted rehearing *en banc* of the decision below, Teva's petition asked this Court to stay the instant petition pending the Ninth Circuit's *en banc* review. That request was purely cautionary: while Teva believes the Ninth

Circuit has jurisdiction over the pending *en banc* appeal (and Respondents do not argue otherwise), in the event that the Ninth Circuit concludes it cannot hear this case *en banc* by virtue of CAFA's 60-day time limit on review in the court of appeals, *see* 28 U.S.C. § 1453(c), any question about the timeliness of this petition would be avoided.

Holding the instant petition in abeyance is an accepted and practical means of ensuring this Court's ability to review the decision below, without encountering any questions concerning the timeliness of the petition. Respondents thus err in claiming that Teva is prematurely seeking certiorari before judgment. Teva is doing the opposite: it is asking this Court to hold the petition until the Ninth Circuit issues its *en banc* decision. Respondents identify no harm associated with that request, and there is none. There is no reason in law or logic to create a potentially unnecessary and avoidable impediment to this Court's review of an important issue that has divided the circuits.

ARGUMENT IN REPLY

I. THE DEEPENING SPLIT AMONG THE CIRCUITS ON AN IMPORTANT QUESTION OF FEDERAL LAW MERITS THIS COURT'S REVIEW

Respondents posit that there is "no 'split among the circuits' for this Court to resolve." Opp. 14. That statement ignores reality. While Respondents claim that the decisions at issue each "arise on significantly different facts, and involve different state procedural rules," *id.*, those are distinctions without a difference when it comes to the question of federal law on which the circuits are decidedly split: whether a motion by

plaintiffs to coordinate or consolidate their cases through trial constitutes a "propos[al]" that those cases "be tried jointly" within the meaning of CAFA. The Ninth Circuit's decision below is an outlier on that key question.

This case involves Respondents' formal request under California Civil Procedure Code § 404.1 to coordinate "for all purposes" before a single California state court forty-one cases filed in multiple counties and consisting of more than 1,500 plaintiffs. Under California's coordination statute, "[c]oordination of civil actions sharing a common question of fact or law is appropriate if *one judge* hearing *all* of the actions *for all purposes* in a selected site or sites will promote the ends of justice." Cal. Civ. Proc. Code § 404.1 (emphasis added). Section 404.1 only allows for coordination "for all purposes," which necessarily encompasses both the pretrial and trial phases of litigation. *See Citicorp N. Am., Inc. v. Superior Court*, 213 Cal. App. 3d 563, 565 n.3 (1989) (explaining that Section 404.1 "provid[es] for the unified management of both the pretrial *and trial phases* of the coordinated cases") (emphasis added). Respondents thus requested coordination through trial when they invoked § 404.1.

The California Rules of Court governing coordination actions confirm this. As those Rules provide, the coordination judge: (1) "may *exercise all the powers* over each coordinated action," Cal. Rules of Court, R. 3.540(b) (emphasis added); (2) "must assume an active role in managing all steps of the pretrial[] discovery[] *and trial proceedings*," *id.* R. 3.541(b) (emphasis added); and (3) "may . . . *schedule and conduct* hearings, conferences, and *a trial or trials*," *id.* (emphasis added). Coordination in California results

in a coordinated action through trial; nothing short of that is legally possible.

Even though Respondents invoked Section 404.1 and filed a coordination petition that expressly sought coordination "for all purposes," the Ninth Circuit looked beyond both the coordination statute and the straightforward text of plaintiffs' request and held that removal was not permitted because the "obvious focus" of the request "was on pretrial proceedings." App. 11. In effect, the panel majority concluded that a request for coordination can support removal only if it contains the word "trial." *See* Pet. 10. As Judge Gould correctly recognized in dissent, *see* App. 19, that holding exalted form over substance and, in doing so, created a split with the Seventh Circuit decision in *In re Abbott Laboratories, Inc.*, 698 F.3d 568 (7th Cir. 2012), a split that has since been exacerbated by the Eighth Circuit's decision in *Atwell v. Boston Scientific Corp.*, 740 F.3d 1160 (8th Cir. 2013).

The *Abbott* decision cannot be reconciled with the decision below. In *Abbott*, the plaintiffs requested consolidation "through trial" and "not solely for pretrial proceedings," pursuant to the appropriate Illinois procedural rules. 698 F.3d at 573. The Seventh Circuit concluded that such a request constituted a proposal that the cases "be tried jointly" within the meaning of CAFA. *Id.*

Respondents, like the majority in the Ninth Circuit panel, attempt to distinguish *Abbott* on the ground that "this case involves a completely different procedure from that in *Abbott Laboratories*," in that this case involves a *coordination* request whereas *Abbott* involved a *consolidation* request. Opp. 13. But the distinction is one of terminology only. *Abbott* concerned a request that is the same as that governed

by California's coordination statute: a proposal to transfer lawsuits filed in different counties to a single county. *Abbott*, 698 F.3d at 570-71.

Nor can *Abbott* be distinguished on the ground that the plaintiffs there requested consolidation "through trial." *Id.* at 571. Such specification was necessary in *Abbott* because the applicable Illinois rule permitted a party to consolidate civil actions for "pretrial, trial, or post-trial proceedings." Ill. R. Sup. Ct. 384(a). That the Respondents here did not specifically use the word "trial" in their coordination petition is not a point of distinction because Respondents had no need to do so: California Code of Civil Procedure § 404.1 provides only for coordination "for all purposes," which already includes trial. Indeed, CAFA creates a specific carve-out from the definition of "mass action" for civil actions in which "the claims have been consolidated or coordinated *solely* for pretrial proceedings." 28 U.S.C. § 1332(d)(11)(B)(ii)(IV) (emphasis added). Respondents have never claimed this safe harbor applies, nor could they when they purposefully invoked a coordination statute that provides for coordination "for all purposes," and which is not limited to pretrial proceedings.

Respondents claim that *Abbott* is distinguishable because it was a consolidation case, whereas here Respondents "never requested consolidation" under California Civil Procedure Code § 1048(a). Opp. 13. The panel decision did not rely on Section 1048(a), and for good reason. A petition for coordination under Section 404.1 already seeks coordination "for all purposes," including trial. By seeking coordination, Respondents proposed that the coordination judge conduct a coordinated trial, which could be accomplished in a variety of ways, including one trial

involving all plaintiffs' claims, a series of exemplar trials featuring several plaintiffs, or many individual trials conducted under the auspices of the coordination process. Under any of these scenarios, plaintiffs' claims are "proposed to be tried jointly" within the meaning of 28 U.S.C. § 1332(d)(11)(B)(i), that is to say, simultaneously or in conjunction with one another. Respondents cite no authority for the proposition that plaintiffs who coordinate their actions under Section 404.1 must thereafter move to consolidate them under Section 1048(a), and the California coordination statute and California Rules of Court already establish that the coordination judge has the power to try jointly the coordinated case. *See* Eric E. Younger & Donald E. Bradley, *Younger on California Motions* § 22:14 (2d ed. 2012) ("Coordination is the equivalent of consolidation of cases *pending in different counties*.") (emphasis in original).

Respondents likewise err in trying to distinguish the Eighth Circuit's decision in *Atwell*. Opp. 14. While Respondents claim that *Atwell* turned on certain "oral representations" that were made by the plaintiffs there, *id.*, Respondents ignore the broader principle underlying the *Atwell* decision. The plaintiffs in *Atwell* specifically "disavow[ed] a desire to consolidate cases for trial." *Atwell*, 740 F.3d at 1165. But the Eighth Circuit looked through that disavowal to the actual substance of their proposal.

In light of the fact that plaintiffs had proposed that the cases be assigned to a single judge through the trial process, the Eighth Circuit agreed with Judge Gould's dissenting opinion in the decision below that the case was removable because "'it is a natural and probable consequence of the grant of the petition seeking coordination … that these varied actions must be tried

together.'" *Id.* (quoting *Romo v. Teva Pharms. USA, Inc.*, 731 F.3d 918, 928 (9th Cir. 2013) (Gould, J., dissenting)). Thus, the *Atwell* Court "agree[d] with *Abbott Labs* and with Judge Gould's interpretation of the statute and the *Abbott Labs* decision." *Id.* It is hard to imagine firmer evidence of disagreement among the lower courts.

Opinions issued since Teva filed its petition for writ of certiorari underscore the disagreement that exists between the Ninth Circuit, on the one hand, and the Seventh and Eighth Circuits, on the other. *See Parsons v. Johnson & Johnson*, 2014 WL 1399750, at *9 (10th Cir. Apr. 11, 2014) (Anderson, J., concurring) (agreeing that the question presented here was not implicated but noting the divergence of authority among the circuits and "find[ing] Judge Gould's reasoning [in *Romo*] to be persuasive"); *In re Avandia Marketing, Sales Practices, and Prods. Liab. Litig.*, No. 07-md-1871, 2014 WL 2011597, at *8 (E.D. Pa. May 15, 2014) (concluding that while the question was not presented, "this Court was more persuaded by the reasoning of the dissent [in *Romo*] as it applies to a case where plaintiffs actually proposed a joint trial").

In an attempt to avoid the important federal issue at stake here, Respondents argue that Teva's petition presents what is "predominantly a question of state law that does not merit the Court's consideration." Opp. 9. That is incorrect. This case squarely presents an issue of federal law, namely the proper interpretation of the provision in CAFA—a federal statute—that permits removal to federal court of civil actions consisting of, *inter alia*, claims that "are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i).

Since state law issues not infrequently underlie federal statutory questions, it is well-settled that certiorari is appropriate in such circumstances, namely, when this Court is asked to determine the nature of the interaction between a federal statute and some state law. *See, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 7-9 (2004) (deciding whether the term "crime of violence" in the federal Immigration and Nationality Act encompasses the offense of driving under the influence as defined by Florida law); *see also Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2473-75 (2013); *Minneci v. Pollard*, 132 S. Ct. 617 (2012).

Although the terminology and procedure differed slightly based on the underlying state law, *Abbott*, *Atwell*, and *Romo* all involved what is ultimately the same procedural request: coordination of multiple cases for trial before a single judge. *See, e.g.*, *Parsons*, 2014 WL 1399750, at *9 (Anderson, J., concurring). Plaintiffs in each case used different language to reflect the appropriate procedures of their respective States, but those distinctions do not change the fact that all three cases involved the same federal question of whether a request for coordination through trial constitutes a "propos[al]" that the relevant cases be "tried jointly" within the meaning of CAFA. This Court's review is neither foreclosed nor disfavored merely because, as here, state law is implicated in an important federal question presented to this Court.

That the Ninth Circuit granted *en banc* review of this case further undercuts Respondents' attempts to downplay the federal issue presented. Rehearing *en banc* is reserved for cases that "involve[] a question of exceptional importance," Fed. R. App. P. 35(a)(2). A court of appeals ordinarily will not grant *en banc* review of a case merely to decide a question of state

law. *See, e.g.*, 3d Cir. Internal Op. P. 9.3.3. ("Rehearing *en banc* is ordinarily not granted when the only issue presented is one of state law."); 6th Cir. R. 35(c) (similar). There is no reason to believe that the Ninth Circuit granted rehearing *en banc* here to decide a question of California procedure, especially when the panel decision did not even rely upon California Civil Procedure Code § 1048(a), the section Respondents invoke here.

Nor should this Court's recent decision in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), influence whether to grant review here. Opp. 14-16. *Hood* has no real bearing on the question presented in Teva's petition because *Hood* addressed the numerosity requirement of CAFA's mass action provision, 134 S. Ct. at 746, which is indisputably satisfied here. This case instead turns on the interpretation of a different element of the statute, namely the requirement that claims be "proposed to be tried jointly."

Respondents contend that certiorari is inappropriate in this case because the courts of appeal should first "be given an opportunity to apply the teachings" from this Court's recent decision in *Hood*. Opp. 15. But no amount of percolation will permit the lower courts to divine from *Hood* an answer to the question presented here, given that *Hood* construed a completely different requirement in CAFA's removal provision.

II. THIS COURT SHOULD HOLD THE PETITION IN ABEYANCE PENDING THE NINTH CIRCUIT'S *EN BANC* REVIEW

In support of their claim that Teva's petition should be denied as "premature," Opp. 5, Respondents argue that Teva is asking this Court to take the "extraordinary step of granting certiorari before judgment," *id.* at 8. That statement mischaracterizes Teva's position. Teva does not seek to terminate proceedings in the Ninth Circuit or obtain immediate review in this Court of the Ninth Circuit's panel decision. Rather, Teva has filed its petition for certiorari—and requested that the petition be held in abeyance—as a protective matter to ensure that review by this Court remains available even if the Ninth Circuit should conclude that it lacks jurisdiction to hear the case *en banc* by operation of CAFA's 60-day time limit on review in the court of appeals. *See* Pet. 17-19; *see also* 28 U.S.C. § 1453(c). Teva believes that the Ninth Circuit has jurisdiction to hear the pending *en banc* appeal, and Respondents have not argued otherwise. Opp. 7 n.6. But, holding the petition in abeyance will allow the Ninth Circuit proceedings to continue while removing any potential risk that this Court would lose the opportunity to review the decision below.

The rules of this Court require a litigant to file a petition for certiorari "within 90 days after entry of the judgment" below. Sup. Ct. R. 13.1; *accord* 28 U.S.C. § 2101(c). A timely petition for rehearing *en banc* in the court of appeals ordinarily extends the time available for filing a petition for certiorari, such that the 90-day period begins to run when rehearing is denied or, if rehearing is granted, when the *en banc*

court of appeals issues its final judgment. *See* Sup. Ct. R. 13.3. However, a defective or improperly filed petition for rehearing *en banc* will *not* extend the deadline for seeking certiorari. *See id.*; *see also Limtiaco v. Camacho*, 549 U.S. 483, 488 (2007); *Morse v. United States*, 270 U.S. 151, 154 (1926).

This protective petition avoids any question about its timeliness in the unlikely event that the Ninth Circuit holds that its own *en banc* review is precluded by CAFA's 60-day time limit. *See* Pet. 17-19. If Teva's petition for rehearing were deemed defective or improperly filed, the 90-day period for seeking certiorari could then be calculated from the date the Ninth Circuit panel entered judgment, not from the date the *en banc* Ninth Circuit denied or dismissed the *en banc* appeal. *See Limtiaco*, 549 U.S. at 488; *Morse*, 270 U.S. at 154. And given that more than 90 days have passed since the panel issued its decision, any subsequent petition for certiorari would be deemed out of time. Hence the need for Teva's protective petition.

Contrary to Respondents' claims, Teva does not seek to derail the "normal appellate process" or obtain certiorari before judgment. Opp. 5. Rather, Teva requests that the instant petition be stayed while the Ninth Circuit completes its *en banc* review. *See* Gressman, Geller *et al.*, *Supreme Court Practice* 339 (9th ed. 2007). Respondents point to no prejudice they would suffer if this Court were to hold this petition. And rightly so, because holding the petition in abeyance would permit the "normal appellate process" in the Ninth Circuit "to run its course" fully, Opp. 5, while still protecting Teva's ability to obtain review in this Court of an important question of federal law as to which there is a split of authority among the circuits.

CONCLUSION

This petition for writ of certiorari should be held in abeyance until the Ninth Circuit issues its *en banc* decision.

June 5, 2014

Respectfully submitted,

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