No. 08-1120

IN THE

Supreme Court of the United States

AMERICAN HOME PRODUCTS CORP. D/B/A WYETH, SMITHKLINE BEECHAM CORPORATION D/B/A GLAXOSMITHKLINE AND GLAXOSMITHKLINE BIOLOGICALS, S.A.,

Petitioners,

v.

MARCELO A. FERRARI AND CAROLYN H. FERRARI, Individually and as Parents and Next Friend of STEFAN R. FERRARI,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Petitioners SmithKline Beecham Corporation's and GlaxoSmithKline Biologicals, S.A.'s Rule 29.6 statements were set forth at page ii of the Petition for a Writ of Certiorari, and there are no amendments to those statements.

Petitioner Wyeth hereby amends its Rule 29.6 statement to state that Pfizer Inc. is the parent corporation of Wyeth and Pfizer Inc. owns 10% or more of Wyeth's stock.

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INTRODUCTION

Pursuant to Supreme Court Rule 15.8, Petitioners submit this Supplemental Brief in response to the supplemental brief recently filed by Respondents (the plaintiffs below). Respondents' trial court filing of a voluntary discontinuance *without prejudice* does not render this case moot. Notwithstanding this without-prejudice dismissal, the judgment of the Georgia Supreme Court has not been vacated and stands as a binding precedent in that state. Thus, an erroneous interpretation of the Vaccine Act continues to control post-Vaccine Court litigation in Georgia, and Respondents—whose claims derive from alleged injuries to a minor child—remain free to revive their case at any time. No precedent from this Court permits a party to both preserve the benefits of a state court ruling and shield it from review. Moreover, Respondents' procedural tactic does nothing to heal the split in the lower courts on the issue, or prevent the harm that can be expected to result from the Georgia Supreme Court's judgment. Thus, there remains an undiminished need for this Court to review the preemption question presented in the Petition.

The Court should grant certiorari in both this case and in the other pending petition that presents the same Vaccine Act preemption issue, *Bruesewitz v. Wyeth, Inc.*, No. 09-152. Alternatively, if the Court grants the writ in *Bruesewitz* only, Petitioners request that it hold this Petition pending the disposition of *Bruesewitz*.

SUPPLEMENTAL STATEMENT OF THE CASE

On June 8, 2009, the Court called for the views of the United States on the Petition in this case. 129 S. Ct. 2786 (2009). The United States has not yet filed its brief in response to the invitation.

On September 21, 2009, without any explanation, Respondents filed a voluntary notice of dismissal without prejudice in the trial court. The notice simply reads that Respondents "give notice, pursuant to Section 41(a)(1)(A) of the Georgia Civil Practice Act, of their dismissal of the . . . action without prejudice." Supp. Br. at 1a. The referenced section of the Georgia Civil Practice Act permits the filing of a voluntary dismissal "at any time before the first witness is sworn" at trial. Ga. Code Ann. § 9-11-41(a)(1)(A). Neither an order of the court nor consent of the other parties is required after issue has been joined, as would be the case under Rule 41 of the Federal Rules of Civil Procedure.

Under Georgia law, Respondents have at least nine years in which to reinstate their dismissed claims. Georgia law provides for the refiling of voluntarily dismissed claims at any time within the original applicable period of limitations or within six months of the dismissal, whichever is later. Ga. Code Ann. § 9-2-61(a). In Georgia, the statute of limitations—which is two years for personal injury actions—tolls for minors up to their 18th birthday. Ga. Code Ann. §§ 9-3-90(a); 9-3-33. The minor Stefan Ferrari was born in 1998. He may refile the case immediately, or at any time before his 20th

birthday (the age of majority plus the two year period of limitations), i.e., 2018.[1]

Respondents did not move to vacate the Georgia Supreme Court's preemption decision. For its part, the Georgia Supreme Court made clear in the opinion under review that its decision will govern post-Vaccine Court cases in Georgia unless and until this Court intervenes. *See* App. 18 (stating that the decision will remain the law of Georgia "at least until the Supreme Court of the United States has spoken on the issue").

ARGUMENT

I. RESPONDENTS' NONPREJUDICIAL DISMISSAL DOES NOT RENDER THIS CASE MOOT.

This case is not moot because: (1) Respondents, the party seeking to render this case moot, prevailed below; (2) the voluntary nonprejudicial dismissal allows Respondents to refile the lawsuit at a time of their choosing; and (3) notwithstanding the dismissal, the Georgia Supreme Court's decision remains in effect and will continue to govern the rights of litigants, including Petitioners, in ongoing actions in the state.

When, as here, it is the prevailing party that seeks to render a case moot, there is "the potential

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[1] The possibility exists that the statute of limitations could be tolled for an even longer period of time. If Stefan Ferrari were declared incompetent because of his autism, the accrual date of the limitations period would toll indefinitely. *See* Ga. Code Ann. § 9-3-90(a).

for gamesmanship," *Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (opinion of Stevens, J., respecting the denial of certiorari), and the Court has recognized the possibility that the maneuvering is an attempt "to manipulate the Court's jurisdiction to insulate a favorable decision from review." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000).

A prevailing party's withdrawal of a claim can result in a moot case only if the Court has the power to prevent gamesmanship, i.e., if the Court can order *both* a prejudicial dismissal of the claims and vacatur of the judgment below. *See Deakins v. Monaghan*, 484 U.S. 193, 201 (1988). In *Deakins*, an action filed in federal court, the equitable relief sought by the respondents (plaintiffs below) formed the basis of one of the questions upon which the Court granted certiorari. *Id.* at 201. At oral argument, however, the respondents stated that they wished to withdraw their claims for equitable relief. *Id.* at 198-99. The Court agreed with respondents that the withdrawn claims were moot because the Court had the ability "to prevent respondents from renewing their claims after they are dismissed as moot." *Id.* at 201 n.4. Specifically, the Court protected the petitioner from the risk of a renewed claim by vacating the Court of Appeals' judgment and directing the dismissal of the claims for equitable relief *with prejudice*. *Id.* at 200-01.

Here, the Court cannot ensure such protections for Petitioners. Respondents' dismissal is without prejudice, and Georgia law allows them to refile their lawsuit at any time. If the Court were to dismiss the Petition as moot, Respondents could refile the lawsuit the very next day. Respondents

bear the "'heavy burden of persuad[ing]'" the Court that they "cannot reasonably be expected" to refile their lawsuit again. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). Respondents have not and cannot meet that heavy burden here. The only way Respondents could have shown this Court that they have decided to end this litigation conclusively would have been to file a voluntary dismissal *with* prejudice. Respondents elected not to do so.

The second *Deakins* requirement—that the judgment below be vacated—is also missing here. Respondents' mootness argument, if accepted by the Court, would leave the judgment below intact because the Court has decided it can only dismiss petitions of moot cases on review from state court and cannot vacate them. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 621 n.1 (1989) (stating that if a case becomes moot on review from a state court, the Court "lack[s] jurisdiction and thus also the power to disturb the state court's judgment."). As long as the judgment here remains intact, Petitioners will be saddled with an "ongoing injury"—the judgment preventing them from asserting their preemption defense in ongoing and future cases in Georgia's state courts. *See Erie*, 529 U.S. at 288. The Court has refused to consider a case moot in such a situation. *See id.* Petitioners are unaware of any case in which this Court has found the controversy moot under the circumstances present here.

The Court should not permit Respondents to avoid review of the state court decision in their favor

while maintaining the precedential authority of the decision in Georgia, particularly where it involves a question of such national importance.

II. THE COURT SHOULD GRANT CERTIORARI IN BOTH THIS CASE AND *BRUESEWITZ*, OR ALTERNATIVELY, HOLD THIS CASE PENDING THE OUTCOME OF *BRUESEWITZ*.

The Court currently has before it two petitions that present the same issue—whether the Vaccine Act's express preemption provision encompasses, and thus preempts, all design defect claims in post-Vaccine Court cases. *See Bruesewitz v. Wyeth, Inc.*, No. 09-152. In *Bruesewitz*, both petitioners and respondent Wyeth (who is also a Petitioner here) requested that the Court grant certiorari based on the split in authority on a legal issue of crucial significance to national health policy.

Petitioners here agree with the *Bruesewitz* respondents that the Court should resolve the question presented now because of the danger that the Georgia Supreme Court's decision poses to the stability of the nation's vaccine supply. The urgency of resolving the question presented is addressed in depth in the Petition, the Reply, and in the amicus briefs submitted in support of the Petition, including the amicus brief from the American Academy of Pediatrics and 10 other physician and public health organizations. If, as a result of Respondents' strategic maneuvering, the Petition is dismissed as moot, the decision below will be left in place and govern other litigation against Petitioners. The Georgia Supreme Court made clear that its decision

is—and will remain—the law of Georgia "at least until the Supreme Court of the United States has spoken on the issue." App. 18.

Petitioners respectfully request that the Court grant certiorari in both this case and *Bruesewitz*. In the event the Court were to grant review in *Bruesewitz* only, Petitioners request that the Court hold this Petition pending the outcome of *Bruesewitz*.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition and Reply, this Court should grant a writ of certiorari, or, in the alternative, hold this case pending resolution of *Bruesewitz*.

Respectfully submitted,

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