

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

EMERSON ELECTRIC CO., ET AL.,
Petitioners

v.

SUPERIOR COURT OF CALIFORNIA, ORANGE COUNTY, ET AL.,

***APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA***

To the Honorable Anthony M. Kennedy, Associate Justice of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.2 of this Court, Emerson Electric Co., Emerson Power Transmission Corp., and Solus Industrial Innovations, LLC,¹ respectfully request a 47-day extension of the time in which to file a petition for a writ of certiorari in this Court, to and including Monday, June 25, 2018. The Supreme Court of California entered judgment on February 8, 2018 in *Solus Industrial Innovations, LLC v. Superior Court of Orange County*, No. S222314. A copy of the Supreme Court of California's opinion is attached as Exhibit 1. See 410 P.3d 32 (Cal. 2018). This Court's jurisdiction would be invoked under 28 U.S.C.

¹ In accordance with this Court's Rule 29.6, applicants' corporate disclosures are appended to the end of this application.

§ 1257(a). Applicants' time to file a petition for a writ of certiorari in this Court will currently expire on May 9, 2018. This application is being filed more than 10 days before that date, and no prior application has been made in this case.

This case presents an important question on which the courts are divided regarding the preemptive scope of the federal Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* ("OSH Act"). The OSH Act "establishes a comprehensive regulatory scheme" for occupational safety and health, *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 147 (1991), under which the federal government, through the Occupational Safety and Health Administration ("OSHA"), establishes and enforces workplace safety standards. States that desire to assume responsibility for development and enforcement of occupational safety and health standards in areas subject to federal regulation may do so, but only by submitting a state plan for initial and ongoing review and approval by the federal Secretary of Labor ("Secretary"). See 29 U.S.C. § 667. In *Gade v. National Solid Wastes Management Association*, this Court held that "nonapproved state regulation of occupational safety and health issues for which a federal standard is in effect" is preempted by federal law, because "the only way a State may regulate an OSHA-regulated occupational safety and health issue is pursuant to an approved state plan." 505 U.S. 88, 98-99 (1992) (plurality opinion); see *id.* at 111-113 (opinion of Kennedy, J.) (same).

Gade addressed workplace safety regulations imposed by a state that had no approved plan. See *id.* at 97. This case presents the question whether the same

principles of OSH Act preemption allow a state that *does* have an approved plan (here, California) to enforce workplace safety standards through mechanisms *not* submitted to or approved by the Secretary (here, a lawsuit by a district attorney seeking civil penalties under state unfair competition and false advertising laws). In the proceedings below, an intermediate California appellate court held such unapproved enforcement mechanisms are preempted, but the California Supreme Court reversed. In so doing, it adopted an exceptionally narrow understanding of the OSH Act's preemptive scope, and its reasoning practically writes *Gade* out of existence in California. In addition, it created a split of authority with the regional federal court of appeals for that state, which has held that "when OSHA promulgates a federal standard, that standard totally occupies the field within the 'issue' of that regulation and preempts all state occupational safety and health laws relating to that issue, conflicting or not, unless they are included in the state plan." *Industrial Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305, 1311 (9th Cir. 1997); accord *Kelly v. USS-Posco Indus.*, 101 Fed. Appx. 182, 184 (9th Cir. 2003). This Court's review is urgently warranted to address the important issues of OSH Act preemption raised by this case.

Undersigned counsel are working diligently, but respectfully submit that the additional time is necessary to complete preparation of a petition for a writ of certiorari. Undersigned counsel were engaged for the first time at the certiorari stage, and substantial work remains to master the full record of the case, to complete research on the authorities supporting this Court's review, and to prepare the petition and appendix for filing. This is a complex case involving the intersection of federal

and state administrative schemes for workplace safety regulation. Among other things, it requires careful review of a large body of case law, statutes, regulations, and administrative precedents addressing the OSH Act and relevant California workplace safety laws. It also requires considerable additional research into California's unfair competition and false advertising laws.

Undersigned counsel also face numerous overlapping deadlines in other matters. Mr. Elwood is currently briefing an appeal in the D.C. Circuit which is on a court-ordered expedited briefing schedule with his opening brief due May 14, *Doe v. Federal Election Commission*, D.C. Cir. No. 18-5099. He is also preparing for a sentencing hearing on May 16 in the United States District Court for the Southern District of New York, *United States v. Atilla*, S4 15 Cr. 867 (RMB). Mr. Etchemendy is preparing another petition for a writ of certiorari in a complex administrative case, due on May 31, 2018. He also has impending filings before the Federal Energy Regulatory Commission (due April 30, 2018), and a substantive motion due in *HALT v. FERC*, D.C. Cir. No. 18-1079, on May 7, 2018.

Wherefore applicants respectfully request that an order be entered extending their time to file a petition for a writ of certiorari to and including Monday, June 25, 2018.

Respectfully submitted,

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April 27, 2018

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, applicants provide the following disclosures:

1. Emerson Electric Co. (NYSE: EMR) is a publicly held corporation that has no parent corporation, and no publicly held company owns 10% or more of its stock.

2. On January 30, 2015, Emerson Electric Co. divested its Power Transmission Solutions business to Regal Beloit Corporation (NYSE: RBC). Pursuant to the divestiture agreement, Emerson Electric Co. retained the liability of the Solus litigation. Prior to the divestiture, Emerson Power Transmission Corporation and Solus Industrial Innovations, LLC were both indirect, wholly owned subsidiaries of Emerson Electric Co.

Dated: April 27, 2018

Respectfully submitted,

John P. Elwood /mxe

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