

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DETROIT INTERNATIONAL BRIDGE COMPANY, *et al.*
Applicants,

v.

UNITED STATES DEPARTMENT OF STATE, *et al.*,
Respondents.

**APPLICATION TO THE HON. JOHN G. ROBERTS, JR.
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT**

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and
Circuit Justice for the D.C. Circuit:

Pursuant to Rule 13.5 of this Court, Applicants Detroit International Bridge
Co. and Canadian Transit Co.¹ respectfully request that the time to file a petition
for a writ of certiorari in this matter be extended 60 days, to and including August
3, 2018.² The United States Court of Appeals for the D.C. Circuit entered judgment
on November 21, 2017, and denied a timely petition for panel rehearing or

¹ Pursuant to Rule 29.6 of this Court, Applicant Canadian Transit Company states that it is wholly owned by Applicant Detroit International Bridge Company. Applicant Detroit International Bridge Company states that it is wholly owned by DIBC Holdings, Inc., the only owner of which is Matthew T. Moroun, an individual. No publicly held company owns 10% or more of either Applicant's stock.

² Respondents in this Court are: the United States Department of State; the United States Coast Guard; the Federal Highway Administration; Mike Pompeo, in his official capacity as Secretary of State; Admiral Paul F. Zukunft, in his official capacity as Commandant of the United States Coast Guard; Kirstjen M. Nielsen, in her official capacity as Secretary of Homeland Security; Elaine L. Chao, in her official capacity as Secretary of Transportation; Brandye Hendrickson, in her official capacity as Acting Administrator of the Federal Highway Administration; and the United States of America.

rehearing *en banc* on March 6, 2018. Concurrent with the denial of panel rehearing, the Court of Appeals reissued an amended opinion on March 6, 2018. Copies of that opinion, the order denying panel rehearing, and the order denying rehearing *en banc* are attached to this application. Unless extended, the time for filing a petition for certiorari will expire on June 4, 2018. This Court’s jurisdiction will be invoked under 28 U.S.C. § 1254.

In support of this application, Applicants state as follows:

1. The decision below involves important questions of federal law that should be answered by this Court. The Court of Appeals held (1) that the Constitution permits Congress to delegate its authority under the Compact Clause to the Executive Branch; (2) that a delegation of congressional authority to an Executive-Branch agency may be sustained even if the statute contains no “intelligible principle” beyond the *identity* of that Executive-Branch agency to whom the Congressional power has been delegated; and (3) that where the scope of an agency’s authority depends on a contested question of state law, agency action may be upheld if the agency’s inquiry into that state-law question satisfies minimal review into whether the agency’s action was arbitrary or capricious, rather than a *de novo* review on the point of law at issue. Each of these holdings goes beyond anything this Court has countenanced in its own precedents, and is worthy of this Court’s review.

Applicants own and operate the Ambassador Bridge, the only bridge spanning the Detroit River to connect Detroit, Michigan with Windsor, Ontario. In

1921, Congress granted Applicants’ legal predecessor the right to construct a bridge across the Detroit River, and to “maintain and operate” that bridge in perpetuity. Act of March 4, 1921 § 1, Pub. L. No. 66-395, 41 Stat. 1439. The Act confers the same right on Applicants as successors of the original grantee. *Id.*

The Constitution’s Compact Clause provides that “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact . . . with a foreign power.” U.S. Const. art. I, § 10, cl. 3. In Section 3 of the International Bridge Act (“IBA”), Congress has purported to delegate its power to approve certain foreign compacts involving international bridges to the Secretary of State. 33 U.S.C. § 535a.

In this case, the Governor of Michigan and two Michigan executive agencies entered into a “Crossing Agreement” with Canada, providing for the construction of a new bridge spanning the Detroit River. After the Secretary of State approved the Crossing Agreement, Applicants—who disputed the Crossing Agreement’s validity under Michigan law—challenged the approval in the District Court, asserting several claims, including that Section 3 of the IBA effected an unconstitutional delegation of congressional power to the Executive Branch and that the approval failed APA review because the Crossing Agreement was invalid under Michigan law and therefore invalid under the IBA. The District Court rejected those claims, and the Court of Appeals affirmed.

The decision below presents at least three important questions of federal law that warrant further review in this Court. First, this Court has never held that Congress may delegate powers that the Constitution specifically and expressly

assigns only to Congress, such as its power to consent to or approve certain acts or appointments, such as agreements between States and a foreign power; treaties; judges, ambassadors, and officers; gifts or titles from foreign states; or duties imposed by states. In holding that Congress may delegate one such responsibility—the power to consent to agreements between a state and a foreign state—the decision below opens the door to further disturbance to the Constitution’s separation of powers.

Second, this Court has never upheld any delegation of congressional authority to the Executive Branch on the theory embraced by the decision below: that the identity of the agency receiving that delegation—rather than a principle derived from the text of the delegating statute itself—is a sufficient “intelligible principle.” If that expansive holding is correct, then the limits on Congress’s ability to delegate its constitutionally-assigned functions are really no limits at all.

Third, this case raises an important question about the appropriate amount of deference to be afforded to federal agencies assessing the scope of their own authority when that scope depends on a contested question of state law. Applicants have consistently argued that the Secretary of State lacked authority to approve the Crossing Agreement because the Crossing Agreement was invalid under Michigan law and thus not an “agreement” within the meaning of the IBA. In resolving that disputed state-law issue, the Secretary of State deferred to the views of the Attorney General of Michigan, who asserted that the Crossing Agreement was valid under Michigan law. The Court of Appeals held that a federal court reviewing such

an Executive-Branch determination of a contested state-law question need not exercise independent judicial review of that legal issue: instead, the federal court must accept the Executive-Branch official's legal conclusion so long as the steps he took to reach that conclusion satisfy minimal arbitrary-and-capricious review. That, too, is a holding that this Court should review.

2. Applicants require more time to prepare a petition for certiorari presenting these important unresolved questions. Undersigned counsel of record Hamish Hume has had substantial trial, briefing, and argument obligations in the past month, including preparation for trial and conducting trial as lead counsel in the Eastern District of Pennsylvania during the last week of April. Post-trial briefing deadlines relating to that trial extend through May and June. Mr. Hume has similar substantial obligations in the coming months, including an argument in Florida court relating to an upcoming trial, among other important briefing obligations.

For the foregoing reasons, Applicants respectfully request that an extension of time to file a petition for certiorari be granted to and including August 3, 2018.

May 16, 2018

Respectfully submitted,

/s/ Hamish Hume

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