

No. \_\_\_\_\_

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# In the Supreme Court of the United States

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Residents Against Flooding; Anita Giezentanner;  
Virginia Gregory; Lois Myers,

*Petitioners,*

v.

Reinvestment Zone Number Seventeen, Memorial City Redevelopment Authority,  
City of Houston,

*Respondents.*

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## APPLICATION FOR AN EXTENSION OF TIME TO FILE PETITION FOR A WRIT OF CERTIORARI

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**To the Honorable Samuel A. Alito, Jr., Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Fifth Circuit:**

1. Pursuant to Supreme Court Rules 13.5 and 30.4, petitioners Residents Against Flooding<sup>1</sup> Anita Giezentanner, Virginia Gregory, and Lois Myers (“Petitioners”) respectfully request a 60-day extension of time to file a petition for a writ of certiorari to review the Fifth Circuit’s final judgment, issued May 22, 2018 (Exhibit A). This would extend the petition deadline from August 20, 2018 to October 19, 2018.

2. This application is being filed more than 10 days in advance of the date on which the time for filing the petition is to expire.

3. The Court has jurisdiction to review the Fifth Circuit’s judgment under 28 U.S.C. § 1254(1).

4. The Petitioners in this suit are comprised of a local nonprofit organization called Residents Against Flooding, as well as three residents of Houston, Texas. After the Fifth Circuit issued its decision in late May, it took approximately two (2) months for Petitioners to make a decision regarding petitioning for review to the Supreme Court of the United States, in terms of the financial commitment involved. In part, this was due to the nonprofit Petitioner Residents Against Flooding needing to communicate with its members and raise funds. On July 29, 2018, undersigned counsel was informed that funds were raised, and the attorneys were instructed to proceed. During that two-month period, attorneys did not work on the case. This was an unavoidable delay.

5. The lead attorney in this case is Charles Irvine of Irvine & Conner PLLC. He is among the court-appointed lead counsel in the mass-plaintiff action, *In re Upstream Addicks &*

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<sup>1</sup> Under Rule 29.2 of this Court’s Rules, Petitioner Residents Against Flooding states that it is a non-profit organization with no parent corporations. It has not issued stock.

*Barker (Texas) Flood-Control Reservoirs*, No. 17-9001L, which is pending in the United States Court of Federal Claims. Several depositions have taken place in late July and early August in that case. Irvine & Conner is a small law firm, and these and other commitments have limited counsel's availability to work on this matter between the time of client approval and August 20, 2018.

6. A 60-day extension would allow counsel the time necessary to prepare the petition for filing.

7. Finally, we submit that this case raises an issue of national judicial importance: that is, the collision of the 12(b)(6) standard of review, which is highly deferential to a plaintiff's pleadings, and the Fourteenth Amendment's rational basis test, which is typically deferential to a governmental defendant's action or decision. This collision has been articulated by the Seventh Circuit pre-*Iqbal* and pre-*Twombly* as a "perplexing situation," calling the 12(b)(6) standard "procedural" and the rational basis standard "substantive." *Wroblewski v. City of Washburn*, 965 F.2d 452, 460 (7th Cir. 1992); *see also Pittsfield Dev., LLC v. City of Chicago*, No. 17-C-1951, 2017 WL 5891223, at \*10 (N.D. Ill. Nov. 28, 2017) ("Because of the factual nature of the rational basis test, any request for 12(b)(6) judgment on rational basis ground will inherently present the Court with an uncomfortable dilemma."). As one lower court recently acknowledged, "[i]f rational basis review is not a rubber stamp, then there must be a role for actual fact-finding, and it must be possible for a plaintiff to prove facts to overcome the presumption of constitutionality." *Pittsfield Dev.*, 2017 WL 5891223, at \*10 (citing Timothy Sandefur, Rational Basis and the 12(b)(6) Motion: An Unnecessary 'Perplexity', 25 Geo. Mason U. Civ. Rits. L.J. 43, 60–61 (2014) (internal quotations omitted)). Appellate courts have treated this "perplexing situation" or "uncomfortable dilemma" in conflicting ways, with the Fifth Circuit decision below

treating rational basis as a “rubber stamp” and manufacturing a rational basis that was untethered to the facts as pled in the Complaint.

8. In this regard, we note that other cases are coming before this Court, such as *Niang et al. v. Tomblinson et al.*, No. 17-1428 (on review from the Eighth Circuit), also seeking guidance on rational-basis review standards in Fourteenth Amendment cases. As in *Niang*, we have identified a circuit split on the issue presented by Petitioners’ case here, for which we plan to seek this Court’s review.

9. This request for extension is not being sought for delay, but for good cause as stated herein.

### **Requested Relief**

Accordingly, Petitioners Residents Against Flooding, Anita Giezentanner, Virginia Gregory, and Lois Myers respectfully request that an order be entered extending the time to file a petition for a writ of certiorari for 60 days, up to and including Friday, October 19, 2018.

Dated: August 8, 2018

Respectfully Submitted,

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