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In The
SUPREME COURT OF THE UNITED STATES
October Term 2018

American Fuel & Petrochemical Manufacturers *et al.*,
Applicants/Petitioners,

v.

Jane O’Keeffe *et al.*,
Respondents.

Application 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 Ninth Circuit

APPLICATION TO THE HONORABLE
ELENA KAGAN, AS CIRCUIT JUSTICE

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November 15, 2018

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PARTIES TO THE PROCEEDING

Applicants American Fuel & Petrochemical Manufacturers (AFPM), American Trucking Associations, Inc. (ATA), and Consumer Energy Alliance (CEA) were plaintiffs-appellants in the proceeding below.

Respondents Jane O’Keeffe, Ed Armstrong, Morgan Rider, Colleen Johnson, Melinda Eden, Dick Pedersen, Joni Hammond, Wendy Wiles, David Collier, Jeffrey Stocum, Cory-Ann Wind, Lydia Emer, Leah Feldon, Greg Aldrich, Sue Langston, Ellen F. Rosenblum, and Kate Brown were defendants-appellees in the proceedings below.

Respondents California Air Resources Board, State of Washington, Oregon Environmental Council, Sierra Club, Natural Resources Defense Council, Environmental Defense Fund, and Climate Solutions were intervenors-defendants-appellees in the proceedings below.

STATEMENT PURSUANT TO RULE 29.6

AFPM is a national trade association of more than 400 companies. It has no parent corporation, and no publicly held corporation has 10 percent or greater ownership in AFPM.

ATA is a national trade association. It has not parent corporation, and no publicly held corporation has 10 percent or greater ownership in ATA.

CEA is a national trade association of more than 400,000 individual members. It has not parent corporation, and no publicly held corporation has 10 percent or greater ownership in CEA.

APPLICATION FOR EXTENSION OF TIME

Pursuant to this Court's Rule 13.5 and 28 U.S.C. § 2101(c), Applicants AFPM, ATA, and ETA (collectively, Applicants) hereby request a 30-day extension of time within which to file a petition for a writ of certiorari, to and including January 7, 2019.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *American Fuel & Petrochemical Manufacturers v. O'Keeffe*, No. 15-35834 (9th Cir. Sept. 7, 2018), a copy of which is attached as Exhibit A.

JURISDICTION

The U.S. Court of Appeals for the Ninth Circuit entered judgment on September 7, 2018. This Court's jurisdiction will rest on 28 U.S.C. § 1254. Under Rules 13.1, 13.3, and 30.1 of this Court, a petition for a writ of certiorari is due to be filed on or before December 6, 2018. In accordance with Rule 13.5, AFPM has filed this application more than 10 days in advance of that due date.

REASONS JUSTIFYING AN EXTENSION OF TIME

Applicants respectfully request a 30-day extension of time within which to file a petition for a writ of certiorari seeking review of the decision of the U.S. Court of Appeals for the Ninth Circuit in this case to and including January 7, 2019. An extension is warranted because of the importance of the issues presented and

undersigned counsels' need for additional time to prepare a petition that will assist this Court in deciding whether to grant certiorari.

1. This case concerns the Oregon Clean Fuel Program (Oregon Program), a regulation that is designed to restructure the market for transportation fuels produced in and imported into Oregon. The Oregon Program regulates extraterritorially and imposes burdens on imported transportation fuels, especially gasoline, diesel fuel, and Midwest ethanol, and is designed to promote and subsidize the development of a competing in-state transportation fuel industry. AFPM filed its complaint challenging Oregon's authority to regulate interstate and foreign commerce and to discriminate against interstate and foreign commerce.

2. The U.S. District Court for the District of Oregon granted judgment in favor of the Respondents, and the Ninth Circuit affirmed. The Ninth Circuit held that the Oregon Program's "assigning petroleum and Midwest ethanol higher carbon intensities than Oregon biofuels" was not discriminatory on its face, Ex. A at 13–14; that the complaint "does not allege that the Oregon program was enacted for the purpose of supporting a uniquely local industry," Ex. A at 17; that the complaint does not allege that the Oregon Program has a discriminatory effect against out-of-state producers and in favor of in-state entities, Ex. A at 18–23; that the Oregon Program survived the balancing set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), Ex. A at 23–24; and that "the Program does not legislate extraterritorially," Ex. A at 24-25. In dissent, Judge N. Randy Smith stated that AFPM "plausibly alleges that the Oregon program discriminates in practical effect," Ex. A at 30 and that "the

discriminatory practical effect of Oregon's program and the availability of nondiscriminatory alternatives plainly state a claim under the Commerce Clause that ought to survive a motion to dismiss," Ex. A at 31.

3. The Ninth Circuit's decision warrants review. The Oregon Program violates the federal structure of the Constitution and the Commerce Clause by regulating economic activity that occurs wholly outside Oregon. The Oregon Program also discriminates against imported gasoline and diesel fuel and imported Midwest ethanol by placing them at a commercial disadvantage as compared with Oregon ethanol and other biofuel. The decision thus conflicts with decisions of this Court and others. *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994); *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). The decision has significant practical import as well and will have a significant effect on interstate commerce and the national economy.

4. Undersigned counsel respectfully submit that the extension of time requested here is warranted because counsel of record has multiple obligations that would make it difficult to complete a petition for certiorari by the current deadline. Those obligations include (1) the preparation of a Complaint and Motion for a Temporary Restraining Order/Preliminary Injunction by the end of November challenging a final agency action under the Administrative Procedure Act, (2) a reply and opposition brief in connection with a Motion to Dismiss based upon lack of personal jurisdiction in litigation pending in federal district court in Mississippi, and (3) responses to a series of motions in a Multi-District Litigation pending in the

Federal District Court for the District of Maryland. The extension is also appropriate in light of the importance of these issues because undersigned counsel require additional time to prepare a petition that will assist the Court in considering these questions.

CONCLUSION

For these reasons, Applicants respectfully request an extension of 30 days, to and including January 7, 2019, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,

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