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In The
SUPREME COURT OF THE UNITED STATES
October Term 2018

American Fuel & Petrochemical Manufacturers Association *et al.*,
Applicants/Petitioners,
v.
Richard W. Corey *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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April 4, 2019

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PARTIES TO THE PROCEEDING

Applicants American Fuel & Petrochemical Manufacturers Association (formerly known as National Petrochemical & Refiners Association) (AFPM); American Trucking Associations (ATA); and Consumer Energy Alliance (CEA) were plaintiffs-appellants in the proceeding below.

Rocky Mountain Farmers Union; Redwood County Minnesota Corn and Soybean Growers; Penny Newman Grain, Inc.; Rex Nederend; Fresno County Farm Bureau; Nisei Farmers League; California Dairy Campaign; and Growth Energy also were plaintiffs-appellants in the proceeding below.

Respondents Richard W. Corey; Alexander Sherriffs; Barbara Riordan; Hector De La Torre; John Eisenhut; John Gioia; Mary D. Nichols; Ron Roberts; Daniel Sperling; Sandra Berg; John R. Balmes; Phil Serna; Dean Florez; Diane Takvorian; Judy A. Mitchell; Gavin Newsom; and Xavier Becerra were defendants-appellees in the proceedings below.

Respondents Sierra Club; Conservation Law Foundation; Environmental Defense Fund; and Natural Resources Defense Council 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 no 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 no 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 60-day extension of time within which to file a petition for a writ of certiorari to and including June 17, 2019.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940 (9th Cir. 2019), a copy of which is attached as Exhibit A.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on January 18, 2019. 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 April 18, 2019. In accordance with Rule 13.5, Applicants have filed this application more than 10 days in advance of that due date.

REASONS JUSTIFYING AN EXTENSION OF TIME

Applicants respectfully request a 60-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 June 17, 2019. An extension is warranted because of the importance of the issues presented and undersigned counsel's need for additional time to prepare a petition that will assist this Court in deciding whether to grant certiorari.

1. This case concerns California's Low Carbon Fuel Standard (LCFS), a regulation that is designed to impose significant restrictions on the import of

transportation fuels to California based upon the manner that those fuels are produced in interstate and foreign commerce. The LCFS regulates extraterritorially and imposes burdens on imported transportation fuels, including gasoline, diesel fuel, and Midwest ethanol, and is designed to promote and subsidize the development of California's competing in-state transportation fuel industry. Applicants filed a complaint alleging that the LCFS violates the Commerce Clause and the federal structure of the Constitution by regulating extraterritorially and violates the Commerce Clause by facially and purposefully discriminating against interstate and foreign commerce.

2. In the decision below, the Ninth Circuit held that it was bound by its earlier decisions on the questions whether the California LCFS violated the prohibition against extraterritorial regulation inherent in the federal structure of the Constitution and under the dormant Commerce Clause. Ex. A at 21-22, 25-26 (citing *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), *cert. denied*, 573 U.S. 946 (2014) (Mem.), and *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903 (9th Cir. 2018), *petition for cert. filed*, No. 18-881 (U.S. Jan. 7, 2019)). The Ninth Circuit also held that it was bound by this precedent in holding that the LCFS did not violate the Commerce Clause by discriminating against interstate and foreign commerce. Ex. A at 26-32.

3. The Ninth Circuit's decision warrants review. The California LCFS violates the Constitution by regulating economic activity that occurs wholly outside California. The LCFS also discriminates against imported gasoline and diesel fuel

and imported Midwest ethanol. Further, the decision of the Ninth Circuit conflicts with decisions of this Court and the federal courts of appeals. *Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality*, 511 U.S. 93, 99 (1994) (applying strict scrutiny to strike down discriminatory law); *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (striking down extraterritorial regulation); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 46-47 (1st Cir. 1999) (striking down Massachusetts law that restricted ability of companies to enter contracts in Massachusetts based upon their conduct in Burma), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Ass'n for Accessible Meds. v. Frosh*, 887 F.3d 664, 671 (4th Cir. 2018) (striking down extraterritorial Maryland law), *cert. denied*, No. 18-546 (U.S. Feb. 19, 2019); *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 834 (7th Cir. 2017) (striking down regulation of out-of-state manufacturing requirements) (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion)). The decision of the Ninth Circuit implicates this conflict among the lower courts. Further, California’s extraterritorial regulation involves the national and international transportation fuel market and therefore has significant practical import for the national economy.¹

4. Undersigned counsel respectfully submits 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.

¹ Applicants have challenged a similar program in Oregon that was upheld by the Ninth Circuit in *American Fuel & Petrochemical Manufacturers v. O’Keeffe*, 903 F.3d 903 (9th Cir. 2018). As noted above, Applicants’ petition for certiorari is pending before this Court. See *Am. Fuel & Petrochemical Mfrs. v. O’Keeffe*, No. 18-881 (U.S. petition filed Jan. 7, 2019).

The extension is also appropriate in light of the importance of these issues because undersigned counsel requires 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 60 days, to and including June 17, 2019, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,

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