

App. No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SIERRA CLUB,
Applicant,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

**APPLICATION TO THE HONORABLE
JOHN G. ROBERTS, JR., AS CIRCUIT JUDGE**

DATED: December 6, 2019

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PARTIES TO THE PROCEEDING

The petitioner in the above-captioned case is Sierra Club.

The respondents in the above-captioned case are the United States Environmental Protection Agency (“EPA”) and Andrew Wheeler, in his official capacity as Administrator of the EPA.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to this Court’s Rule 29.6, the applicants make the following statements:

Sierra Club is a corporation organized and existing under the laws of the State of California. It is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

Sierra Club has no parent corporation, and no publicly held company owns 10% or more of ownership.

REQUEST FOR EXTENSION

To the Honorable John Roberts, Chief Justice of the Supreme Court of the United States and as Circuit Justice for the United States Court of Appeals for the District of Columbia Circuit: Applicant Sierra Club respectfully requests that the time for a petition for writ of certiorari in this matter be extended for 58 days to and including February 14, 2020. The Court of Appeals issued its opinion on May 31, 2019 (see App. A, *infra*). On September 19, 2019, the Court of Appeals issued an order (see App. B, *infra*) in which it denied Sierra Club’s timely petition for rehearing *en banc*. Sierra Club’s petition therefore would be due on December 18, 2019 absent an extension. In accordance with Rule 13.5, Sierra Club is filing this application at least ten days before that date. The Court has jurisdiction over the judgment under 28 U.S.C. § 1254(1).

BACKGROUND

This case presents the question of whether the Clean Air Act’s (“Act’s”) deadline for filing a petition for review of EPA rulemaking, 42 U.S.C. § 7607(b) (establishing a 60-day deadline for filing a petition for review), is jurisdictional or a non-jurisdictional claim-processing rule.

Below, Sierra Club challenged an EPA rule that deprives the public of statutorily-mandated opportunities to participate in the review of revisions to state implementation plans. This rule was published on March 28, 2016, and Sierra Club filed the petition for review on May 27, 2016, within 60 days of the promulgation of the rule as required by the Clean Air Act (*see App. C, infra*).

Despite the fact that EPA did not argue that the petition for review was untimely, the D.C. Circuit, *sua sponte*, held that: (1) the Act’s 60-day deadline for filing a petition for review is jurisdictional; and (2) the petition was an untimely challenge to an earlier EPA rule promulgated in 2005. App. A at 4 (stating that “because the [timeliness] issue is jurisdictional, we must raise it ourselves” (internal citations omitted)).

The D.C. Circuit’s ruling deepens an existing Circuit split as to whether the Act’s 60-day deadline for filing a petition for review is jurisdictional or a claim-processing rule. *See Clean Water Action Council v. EPA*, 765 F.3d 749, 753 (7th Cir. 2014) (Easterbrook, J.) (holding that the deadline is non-jurisdictional and noting that the holding “creates a conflict among the circuits”). The Seventh Circuit, faithfully applying this Court’s precedents has held that the Act’s filing deadline is a non-jurisdictional claim-processing rule. *Id.* at 751-52 (citing, *inter alia*, *Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145 (2013), *Henderson v. Shinseki*, 562 U.S. 428 (2011)). The Seventh Circuit concluded that the text of the statute does not “use

language that is traditionally understood as jurisdictional” and that there is no Supreme Court precedent tagging the filing deadline as jurisdictional. *Id.* at 752. The Tenth Circuit has reached the opposite conclusion, reasoning that the Act’s filing deadline uses purportedly “jurisdictional terminology: ‘shall’ and ‘petition for review.’” *Utah v. EPA*, 765 F.3d 1257, 1259 (10th Cir. 2014); *but see Henderson*, 562 U.S. at 439 (“we have rejected the notion that all mandatory prescriptions, however emphatic, are properly typed jurisdictional.” (internal quotation marks, citation, and ellipsis omitted)).

Sierra Club petitioned the D.C. Circuit for rehearing *en banc*. Sierra Club’s petition noted the existence of the circuit split and argued that the Act’s filing deadline is a non-jurisdictional claim-processing rule under this Court’s precedents. The D.C. Circuit denied the petition for rehearing on September 19, 2019.

REASONS FOR GRANTING AN EXTENSION OF TIME

An extension is warranted because of the importance of the issues presented, Applicant’s need to coordinate with counsel to determine whether to file a petition of certiorari, and, if Applicant decides to file such a petition, the need for additional time to prepare a petition that will assist this Court in deciding whether to grant certiorari.

1. The issue in this case is compelling: the D.C. Circuit has entered a decision in conflict with a decision of the Seventh Circuit on an important matter. *See Rule 10(a)*. Moreover, the D.C. Circuit’s decision undermines this Court’s repeated efforts “to bring some discipline to the use of th[e] term [jurisdictional].” *Henderson*, 562 U.S. at 435. *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1848 (2019) (“In recent years, the Court has undertaken ‘[t]o ward off profligate use of the term.’” (quoting *Auburn*, 568 U.S. at 153)).

2. As a result of pre-planned leave, Applicant's principal counsel have had severely limited availability since the D.C. Circuit's September 19, 2019, order denying rehearing *en banc*, and Applicant has been unable to consult with counsel to decide whether to file a petition for a writ of certiorari. Lead counsel, Tosh Sagar, was traveling out of the country on pre-planned vacation between September 20 and October 6, 2019. Subsequently, Applicant's other principal counsel, Seth Johnson, went on parental leave from October 14 until December 2, 2019. This time has been insufficient to make an informed decision as to whether to seek certiorari.

3. Should Applicant seek certiorari, Applicant's principal counsel have other obligations that would make it difficult to complete a petition for certiorari by the current deadline. These include filings and appearances in other courts. For lead counsel, Tosh Sagar, this includes a submission in a case in the U.S. District Court for the Northern District of California (due on December 16, 2019). Applicant's counsel Seth Johnson will be assisting in an argument scheduled for December 19, 2019, in the U.S. District Court for the Northern District of California.

CONCLUSION

For the foregoing reasons, the court should extend the time to file a petition for a writ of certiorari in this appeal 58 days to and including February 14, 2020.

DATED: December 6, 2019

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CERTIFICATE OF SERVICE

I certify that, on this 6th day of December, 2019, I caused a copy of the foregoing Application for Extension of Time to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to be served on the following by first-class mail, postage pre-paid, and by electronic mail on the following:

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