

No. 22A

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IN THE  
**Supreme Court of the United States**

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BG GULF COAST LNG, L.L.C. and PHILLIPS 66 COMPANY,

*Applicants,*

v.

SABINE-NECHES NAVIGATION DISTRICT OF JEFFERSON COUNTY, TEXAS,

*Respondent.*

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**APPLICATION FOR AN EXTENSION OF TIME TO FILE A  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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January 11, 2023

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## **RULE 29.6 STATEMENT**

BG Gulf Coast LNG, L.L.C. is 100% ultimately owned by Shell plc. BG Gulf Coast LNG, L.L.C. is 100% directly owned by BG LNG Services, L.L.C., which is 100% ultimately owned by Shell plc. BG Gulf Coast LNG, L.L.C. and BG LNG Services, L.L.C. are both Delaware limited liability companies and are both indirectly owned subsidiaries of Shell USA, Inc.

Phillips 66 Company is wholly owned by Phillips 66.

## APPLICATION

To the Honorable Samuel Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), Applicants BG Gulf Coast LNG, L.L.C. and Phillips 66 Company respectfully request a 30-day extension of time, to and including February 22, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

1. The United States Court of Appeals for the Fifth Circuit issued its decision on September 14, 2022. *See BG Gulf Coast LNG, L.L.C. v. Sabine-Neches Navigation Dist.*, 49 F.4th 420 (5th Cir. Sept. 14, 2022) (App. 1a-16a). Applicants timely petitioned for rehearing and rehearing en banc, and the Court of Appeals denied the petitions on October 25, 2022. *See BG Gulf Coast LNG v. Sabine Neches Navigation Dist.*, No. 22-40158 (5th Cir. Oct. 25, 2022) (App. 17a). Unless extended, the time to file a petition for certiorari will expire on January 23, 2023. This application is being filed more than ten days before a petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. Petitioners BG Gulf Coast LNG, L.L.C. (BG Gulf Coast) and Phillips 66 Company (Phillips) are energy companies. In September 2021, they filed suit against Respondent Sabine-Neches Navigation District of Jefferson County, Texas (Navigation District), a political subdivision responsible for ports and harbors in southeast Texas. The Navigation District had imposed a user fee on vessels transporting cargo

on the Sabine-Neches Waterway to fund future anticipated costs for a project to upgrade the Waterway. BG Gulf Coast and Phillips make extensive use of the Waterway and are subject to the fee.

3. The Constitution includes several provisions prohibiting states from imposing taxes or fees that would burden interstate commerce. *See* U.S. CONST. art. I, § 10, cls. 2-3 & art. I, § 8, cl. 3. Relevant here, the Tonnage Clause bars duties that, without Congress’s consent, “operate to impose a charge for the privilege of entering, trading in, or lying in a port.” *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 8 (2009) (quotation marks omitted). In the Water Resources Development Act, Congress granted local authorities limited consent to impose “tonnage duties or fees” on vessels using our nation’s ports and harbors, provided those fees satisfy a series of “conditions.” 33 U.S.C. § 2236(a). Congress’s conditions include: (1) a requirement that fees be levied on a “fair and equitable” basis; (2) authorization for fees only after “construction is complete”; (3) overall caps on the total amount of fees levied; and (4) various exemptions for vessels from paying fees. These detailed conditions are not easily complied with, and deliberately so. They ensure that fees are paid only by those who “benefitted directly” from the project for which the fees are assessed. *See New Orleans S.S. Ass’n v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018, 1025-26 (5th Cir. 1989). Fees that fail to meet Congress’ strict conditions lack congressional consent and are unconstitutional.

4. BG Gulf Coast and Phillips alleged that the user fee failed to satisfy the Water Resources Development Act’s conditions, rendering the Navigation District’s

imposition of the user fee unconstitutional. The Navigation District moved to dismiss the complaint, which the district court granted. The court construed the statute to grant the Navigation District the latitude to collect the user fee as currently structured. According to the court, the Act permits the collection of fees for the whole project once one usable increment is completed, rather than the collection of fees only for a completed project or completed usable increment. The court also held that the fee did not violate the Act's vessel exemptions and fee caps. And it held that the imposition of a fee on hydrocarbon cargo ten times greater than the fee on non-hydrocarbon cargo was not inconsistent with the Act's requirement that fees be levied "on a fair and equitable basis." BG Gulf and Phillips appealed the district court's final judgment to the Fifth Circuit.

5. The Fifth Circuit affirmed the district court's order granting the Navigation District's motion to dismiss. Agreeing with the district court's interpretation of the statute, the panel held that the Water Resources Development Act permits the Navigation District to charge a user fee for the entire project once one usable increment is completed. App. 9a-11a. The panel also held that the user fee did not violate the Act's cap on the total amount of fees that can be levied. App. 15a. And the panel approved, without discussion, the district court's dismissal of the companies' other claims. App. 15a-16a. BG Gulf Coast and Phillips petitioned the panel for rehearing and rehearing en banc, which the Fifth Circuit denied. App. 17a.

6. This Court's review is urgently needed to address the proper interpretation of the Water Resources Development Act of 1986, and this case presents an ideal

vehicle to do so. The Act makes it abundantly clear that Congress did not grant local authorities unfettered discretion to impose user fees. But instead of strictly applying the Act's carefully circumscribed conditions, the district court repeatedly stretched the statute beyond the constitutional limits in order to accommodate the Navigation District's assertion of authority. The Navigation District's funding scheme represents a dramatic break from past practice, and the Fifth Circuit's decision opens the door for other municipal districts across the country to fund projects through unfettered duties on shipping. Unless this Court intervenes to recognize the real limits Congress imposed in the Act, shippers will bear a disproportionate—and unconstitutional—burden for fixing our nation's infrastructure. Allowing the Navigation District's funding scheme to stand will also exacerbate the grave economic problems—inflation, supply chain snarls, and high energy costs—the nation faces.

7. Neal Kumar Katyal of Hogan Lovells US LLP, Washington, D.C., was recently retained on behalf of Applicants to file a petition for certiorari in this Court. Over the next several weeks, counsel is occupied with briefing deadlines and arguments for a variety of matters, including: (1) an exceptions brief in *Delaware v. Pennsylvania and Wisconsin*, No. 22O145 (U.S.), and *Arkansas v. Delaware*, No. 22O146 (U.S.), due January 10, 2023; (2) oral argument in *State v. Chauvin*, No. A21-1228 (Minn. Ct. App.), scheduled for January 18, 2023; (3) a reply brief in *Delaware v. Pennsylvania and Wisconsin*, No. 22O145 (U.S.), and *Arkansas v. Delaware*, No. 22O146 (U.S.), due January 20, 2023; and (4) an opening brief and joint appendix in *Coinbase, Inc. v. Bielski*, No. 22-15566 (U.S.), due January 23, 2023. Applicants

request this extension of time to permit counsel to research the relevant legal and factual issues and to prepare a petition that fully addresses the important questions raised by the proceedings below.

8. For these reasons, Applicants respectfully request that an order be entered extending the time to file a petition for certiorari to and including February 22, 2023.

Respectfully submitted,

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