

No. 22A_____

IN THE
SUPREME COURT OF THE UNITED STATES

INDIANA MUNICIPAL POWER AGENCY, MISSOURI JOINT MUNICIPAL ELECTRIC UTILITY
COMMISSION, NORTHERN ILLINOIS MUNICIPAL POWER AGENCY,
AMERICAN MUNICIPAL POWER, INC., ILLINOIS MUNICIPAL ELECTRIC AGENCY,
AND KENTUCKY MUNICIPAL POWER AGENCY,
Applicants,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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May 5, 2023

PARTIES TO THE PROCEEDINGS BELOW

Applicants Indiana Municipal Power Agency, Missouri Joint Municipal Electric Utility Commission, Northern Illinois Municipal Power Agency, American Municipal Power, Inc., Illinois Municipal Electric Agency, and Kentucky Municipal Power Agency were the plaintiffs in the Court of Federal Claims proceedings and the appellants in the court of appeal proceedings.

The United States of America was the defendant in the Court of Federal Claims proceedings and the appellee in the court of appeal proceedings.

RELATED CASES

Indiana Mun. Power Agency, et al. v. United States, No. 2022-1377
(Fed. Cir.) (judgment entered Feb. 17, 2023)

Indiana Mun. Power Agency, et al. v. United States, No. 20-2038C
(Fed. Cl.) (judgments entered July 23, 2021 and Nov. 15, 2021)

Salt River Project Agricultural Improvement District v. United States,
No. 1:21-cv-01519 RAH (Fed. Cl.), also challenges the sequestration of
payments due under the Build America Bonds program. That case has
been stayed by the U.S. Court of Federal Claims pending resolution of
this appeal.

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

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and
Circuit Justice for the Federal Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.3 of the Rules
of this Court, applicants Indiana Municipal Power Agency, Missouri Joint
Municipal Electric Utility Commission, Northern Illinois Municipal Power Agency,
American Municipal Power, Inc., Illinois Municipal Electric Agency, and Kentucky
Municipal Power Agency respectfully request a 56-day extension of time, up to and
including July 13, 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 Federal Circuit.

The court of appeals entered its judgment on February 17, 2023. The court
of appeals' opinion (reported at 59 F.4th 1382) is attached hereto as Exhibit A. The
Court of Federal Claims' opinions (reported at 154 Fed. Cl. 752 and 156 Fed. Cl. 744)
are attached hereto as Exhibits B and C. The petition would be due on May 18, 2023,
and this application is made at least 10 days before that date. This Court's
jurisdiction would be invoked under 28 U.S.C. § 1254(1).

1. This case involves an important issue regarding the federal government's
duty to honor its obligations under money-mandating statutes unless those
obligations are lawfully repealed by Congress. This Court recently emphasized the
“principle as old as the Nation itself: The Government should honor its obligations.”
Maine Cmty. Health Options v. United States, 140 S. Ct. 1308, 1331 (2020). Yet, in

this case, the Federal Circuit allowed federal agencies to renege on a statutory promise to refund 35% of federal tax revenues on certain taxable bonds authorized by the American Recovery and Reinvestment Act of 2009 (“ARRA”) and designed to entice state and local governments, like applicants, to invest in infrastructure projects of long-term benefit to the nation. Applicants were forced to cover the federal government’s shortfall, given their obligations to bondholders, and suffered more than \$96 million in damages. The Federal Circuit allowed this result despite the Court’s recognition that the federal government must honor its obligations under money-mandating statutes unless Congress repeals them. *See id.*

2. This ruling also raises the important question whether a statutory provision creates a contractual obligation when its language and the parties’ course of dealing reflect an intent to contract by the government. The Court has not squarely addressed this issue, but has analyzed similar matters in a manner inconsistent with the Federal Circuit’s conclusion that ARRA did not create a contractual obligation. *See United States Tr. Co. v. New Jersey*, 431 U.S. 1, 17 (1977) (finding it “unnecessary . . . to dwell on the criteria for determining whether state legislation gives rise to a contractual obligation” because no party denied that the statute at issue constituted a contract); *National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry. Co.*, 470 U.S. 451, 470 (1985) (declining to find that statutory provision created a contract because “neither the language of the statute nor the circumstances surrounding its passage manifest any intent on the part of Congress to bind itself contractually”); *United States v. Winstar Corp.*, 518 U.S. 839,

860 (1996) (hearing a case about “enforcement of the governmental contracts at issue” but noting that “[t]he anterior question whether there were contracts at all between the Government and respondents . . . is not strictly before us”); *see also Maine Cmty. Health Options*, 140 S. Ct. at 1331 n.15 (declining to address question whether statute created implied-in-fact contract). Because only the Federal Circuit hears cases involving contracts with the federal government, there is no prospect of a circuit split on this issue. And the amount at stake for applicants, as well as the broader implications of this case for other statutory promises to state and local governments, make this a question of national importance warranting the Court’s review.

3. The 56-day extension to file a certiorari petition is necessary because undersigned counsel only recently has been retained in this matter and needs the additional time to review the record and to prepare the petition and appendix. Counsel also has previously engaged matters, including: (1) a merits reply brief in the Fourth Circuit in *City of Huntington, et al. v. AmerisourceBergen Drug Corp., et al.*, Nos. 22-1819(L) & 22-1822 (filed on May 1, 2023); (2) an opening merits brief in the Third Circuit in *In re Fosamax (Alendronate Sodium) Products Liability Litigation*, No. 22-3412 (due May 22, 2023); (3) oral argument in the Southern District of West Virginia in *GenBioPro, Inc. v. Sorsaia*, No. 3:23-cv-00058 (scheduled for May 23, 2023); and (4) oral argument in the en banc Eleventh Circuit in *Carson v. Monsanto Co.*, No. 21-10994 (scheduled for June 12, 2023). Counsel also has long-scheduled vacation from June 28 to July 4 and July 14-27.

For all these reasons, there is good cause for a 56-day extension of time, up to and including July 13, 2023, within which to file a certiorari petition in this case to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,



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