IN THE SUPREME COURT OF THE UNITED STATES

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No. A-_____

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WILLIAMS ALASKA PETROLEUM, INC.;
THE WILLIAMS COMPANIES, INC.,
APPLICANTS

v.

STATE OF ALASKA; FLINT HILLS RESOURCES, LLC;
FLINT HILLS RESOURCES ALASKA, LLC

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APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE ALASKA SUPREME COURT

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To the Honorable Elena Kagan, Circuit Justice:

Pursuant to Rules 13.5 and 30.2 of this Court, Williams Alaska Petroleum, Inc., and the Williams Companies, Inc., apply for a 32-day extension of time, to and including September 25, 2023 (a Monday), within which to file a petition for writ of certiorari to review the judgment of the Alaska Supreme Court in this case. The Alaska Supreme Court entered its judgment on May 26, 2023. App., infra, 1a-91a. Unless extended, the time for filing a petition for a writ of certiorari will expire on August 24, 2023. The jurisdiction of this Court would be invoked under 28 U.S.C. 1257(a).

1. This case presents the question whether the Due Process Clause forbids the imposition of retroactive liability for conduct in violation of a statute after the administrative agency charged with administering the statute expressly declined to regulate that

conduct. This Court has long maintained that the Due Process Clause establishes a right to fair notice before being deprived of life, liberty, or property. FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012). By protecting regulated parties from statutes and regulations that "'fail[] to provide a person of ordinary intelligence fair notice of what is prohibited,'" this bedrock constitutional principle ensures that regulated parties have the ability to "know what is required of them so they may act accordingly." Ibid. (citation omitted).

With respect to legal rules administered by government agencies, this Court has declined to accept interpretations of statutes and regulations where the relevant conduct "occurred well before the interpretation was announced" and where the regulated entity "had little reason to suspect" that the agency's "longstanding practice" of "never initiat[ing] any enforcement actions" or "otherwise suggest[ing] that it thought the industry was acting unlawfully" meant anything other than "acquiescence." Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155–158 (2012). Of particular relevance here, courts have applied the foregoing principles to prohibit the imposition of retroactive liability under environmental statutes where the regulated party lacked fair notice that a particular substance was regulated. See Commonwealth of Massachusetts v. Blackstone Valley Electric Co., 67 F.3d 981, 991 (1st Cir. 1995); General Electric Co. v. EPA, 53 F.3d 1324, 1330-1332 (D.C. Cir. 1995).

2. Applicants are the former owners and operators of an oil refinery located in North Pole, Alaska. Respondents are the State

of Alaska and the subsequent owner of the refinery, Flint Hills Resources Alaska, LLC, as well as its parent company, Flint Hills Resources, LLC (together, "Flint Hills"). Applicants operated the refinery from 1977 through March 2004, when Flint Hills took possession. In 1985, applicants began using a chemical called sulfolane in their refining process. Applicants recycled and reused the sulfolane, but some escaped into wastewater and then migrated into the surrounding groundwater. App., infra, 4a, 6a.

Under Alaska law, the Alaska Department of Environmental Conservation (DEC) has the authority to regulate the discharge of "hazardous substances." See Alaska Stat. 46.03.822. The relevant environmental statute defines a "hazardous substance" as oil; a substance defined as hazardous under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), see 42 U.S.C. 9601(14); or "an element or compound which, when it enters into the atmosphere or in or upon the water or surface or subsurface land of the state, presents an imminent and substantial danger to the public health or welfare, including but not limited to fish, animals, vegetation, or any part of the natural habitat in which they are found," Alaska Stat. 46.03.826(5).

Sulfolane is not oil and is not listed as a hazardous substance under CERCLA. And when applicants began using sulfolane, DEC did not otherwise regulate the chemical as hazardous. In fact, in communications with applicants, DEC expressly stated that it was not regulating sulfolane. DEC did not provide notice that they considered sulfolane a "hazardous substance" until October

2004, after the refinery's transition to Flint Hills. App., infra, 6a-7a, 60a-61a.

3. In 2014, the State of Alaska brought suit in state court against both applicants and Flint Hills for damages, injunctive relief, and declaratory relief as a result of the discharge of sulfolane at the North Pole refinery. Both applicants and Flint Hills denied liability and brought counterclaims against the State and each other. In 2016, the Alaska Supreme Court dismissed some of Flint Hills' claims against applicants as time-barred. See Flint Hills Resources Alaska, LLC v. Williams Alaska Petroleum, Inc., 377 P.3d 959, 973 (2016). Flint Hills settled with the State shortly thereafter.

After trial, the trial court entered judgment in favor of the State and Flint Hills. The trial court found that sulfolane is a hazardous substance; that applicants were retroactively liable for its release; that the state was entitled to monetary and injunctive relief; and that Flint Hills was entitled to statutory contribution from applicants. The court ordered applicants to pay approximately $21 million to the State of Alaska and $85 million to Flint Hills, including damages for estimated future remediation costs.

4. On appeal to the Alaska Supreme Court, applicants argued that the State violated the Fourteenth Amendment's Due Process Clause by depriving applicants of property without fair notice that sulfolane was considered a "hazardous substance" under Alaska's environmental statutes. Applicants maintained that DEC, through its communications with applicants and its lack of en-

forcement, took the position that it would not pursue an enforcement action on the basis of sulfolane discharge, and that it was undisputed the State did not regulate sulfolane during applicants' operation of the refinery. App., infra., 60a-61a.

The Alaska Supreme Court affirmed. App., infra, 91a. In relevant part, the Alaska Supreme Court recognized that, in communications with applicants, DEC "acknowledged that sulfolane was not then regulated as a hazardous substance because very little was known about it" and "stated that it would follow up with further clarification or action." Id. at 61a. But the court held that DEC was "free" to treat sulfolane as a "hazardous substance" decades after the fact and to seek the imposition of retroactive liability for previous discharges because "DEC had not promulgated prior interpretations about sulfolane in legal briefs, regulations, or adjudications" and because DEC's failure to take previous enforcement actions related to sulfolane did not amount to "acquiescence" in the discharge of the chemical. Id. at 61a-62a.

5. Counsel for applicants respectfully requests a 32-day extension of time, to and including September 25, 2023 (a Monday), within which to file a petition for a writ of certiorari. This case presents complex questions regarding the scope of the Due Process Clause, with significant ramifications for administrative agencies and the entities they regulate. The undersigned counsel did not represent applicants below and requires additional time to review the record and opinions issued by the lower courts. In addition, counsel is currently preparing petitions for writs of certiorari in two cases and an amicus brief in a third case, each

with deadlines before or within a week of the current deadline in this case of August 24, 2023. See Murray v. UBS Securities, LLC, No. 22-660 (amicus briefs supporting respondents due Aug. 15, 2023); State of Minnesota v. American Petroleum Institute, No. 21-1752 (8th Cir.)(cert. petition due Aug. 18, 2023); Connelly v. United States, No. 21-3683 (8th Cir.)(cert. petition due Aug. 31, 2023). Additional time is therefore needed to prepare and print the petition in this case.

Respectfully submitted,

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