IN THE SUPREME COURT OF THE UNITED STATES

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No.

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EXXON MOBIL CORPORATION; AMERICAN PETROLEUM INSTITUTE; DCOR, LLC, APPLICANTS

AND

U.S. DEPARTMENT OF THE INTERIOR; DEB HAALAND, SECRETARY OF THE INTERIOR; BUREAU OF OCEAN ENERGY MANAGEMENT; AMANDA LEFTON, DIRECTOR OF THE BUREAU OF OCEAN ENERGY MANAGEMENT; RICHARD YARDE; BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; KEVIN M. SLIGH, SR., DIRECTOR OF THE BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT; MIKE MITCHELL; DAVID FISH; JOAN BARMINSKI

v.

ENVIRONMENTAL DEFENSE CENTER; SANTA BARBARA CHANNELKEEPER; PEOPLE OF THE STATE OF CALIFORNIA, EX REL. ROB BONTA, ATTORNEY GENERAL; CALIFORNIA COASTAL COMMISSION; CENTER FOR BIOLOGICAL DIVERSITY; WISHTOYO FOUNDATION

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APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI

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To the Honorable Elena Kagan, Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Pursuant to Rules 13.5 and 30.2 of this Court, Exxon Mobil Corporation; American Petroleum Institute; and DCOR, LLC, apply for a 30-day extension of time, to and including January 25, 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 Ninth Circuit in this case. The judgment of the court of appeals was entered on June 3, 2022, App., infra, 1a-76a, and a petition for

rehearing was denied on September 26, 2022, id. at 77a-85a. Unless extended, the time for filing a petition for a writ of certiorari will expire on December 26, 2022. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. This case concerns the reviewability of a programmatic environmental assessment (EA) prepared by two federal agencies and the scope of the consultation requirement under the Coastal Zone Management Act (CZMA). The practical importance of those issues is enormous. As a result of the injunction in this case, the Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement in the Department of the Interior may not approve any permits allowing well-stimulation treatments on the Pacific Outer Continental Shelf. Those treatments, which include hydraulic fracturing, acid fracturing, and matrix acidizing, facilitate access to oil where conventional drilling treatments would be less successful.

Pursuant to the National Environmental Policy Act (NEPA), an agency may prepare an EA to determine whether to issue a "finding of no significant impact" (FONSI), 40 C.F.R. 1508.9 (2016), or an environmental impact statement (EIS), which is a thorough review of a proposed action and alternatives reserved for "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. 4332(2)(C). The programmatic EA here evaluated the environmental effects of using well-stimulation treatments on the Pacific Outer Continental Shelf.

Another statute, the CZMA, specifies the processes that federal agencies, state agencies, and private parties must take to

ensure that offshore activities are consistent with a State's coastal zone management program. If a "Federal agency activity" affects the coastal zone of a State, then the federal agency must provide a "consistency determination" to the State at least 90 days before approving that activity. 16 U.S.C. 1456(c)(1)(A), (C). The CZMA sets forth a different procedure that applies when a private party applies for a Federal license or permit. See 16 U.S.C. 1456(c)(3).

2. The Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement (collectively, the agencies) have permitted drilling in federal waters on the Pacific Outer Continental Shelf off the coast of California for decades. App., infra, 24a. The agencies have also authorized companies to perform well-stimulation treatments in that area. Id. at 25a.

In February 2016, to resolve litigation challenging the approval of permits for well-stimulation treatments, the agencies agreed to conduct a programmatic EA to study the environmental impacts of those treatments on the Pacific Outer Continental Shelf. App., infra, 25a. In May 2016, without authorizing any well-stimulation treatments, the agencies published a final programmatic EA, which found that allowing the use of well-stimulation treatments would cause no significant impacts. Id. at 26a. The agencies recognized that they would need to issue permits at specific sites before well-stimulation treatments could occur. Id. at 29a.

3. Several environmental organizations, the State of California, and the California Coastal Commission filed actions

against the agencies, the Department of the Interior, and several federal officials in the United States District Court for the Central District of California, challenging the agencies' EA and FONSI under NEPA, the CZMA, and the Endangered Species Act. App., infra, 20a, 27a. Applicants intervened as defendants. Id. at 27a.

The agencies and applicant American Petroleum Institute moved to dismiss, arguing that the district court lacked subject matter jurisdiction because the EA was not "final agency action." See 5 U.S.C. 704. The district court denied the motion. App., infra, 27a-28a.

The parties then filed cross-motions for summary judgment, which the district court granted in part and denied in part. The court concluded that the agencies violated the CZMA, because they did not complete a consistency review pursuant to Section 1456(c)(1) before issuing the EA. App., infra, 28a. The court also determined that the agencies violated the Endangered Species Act by failing to consult with the Fish and Wildlife Service before issuing the EA. Ibid. The court further concluded that the agencies satisfied the requirements of NEPA. Ibid.

4. The court of appeals affirmed in part and reversed in part. App., infra, 1a-76a.

As is relevant here, the court of appeals upheld the district court's conclusion that the programmatic EA qualified as "final agency action" under 5 U.S.C. 704. Agency action is "final" if it "mark[s] the consummation of the agency's decisionmaking process" and is "one by which rights or obligations have been determined,

or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-178 (1997) (internal quotation marks and citations omitted). The court reasoned that the EA was the consummation of the agencies' decisionmaking process because "no further programmatic environmental review of [well-stimulation treatments] will be conducted." App., infra, 30a. It further reasoned that the EA determined the parties' legal rights and obligations, because it allowed the permitting process for well-stimulation treatments to proceed, even though the agencies would still need to issue individual permits for specific treatments. Id. at 32a-33a.

The court of appeals also upheld the district court's judgment with respect to the CZMA. App., infra, 65a. It explained that Section 1456(c)(1), governing "Federal agency activity," applied to the programmatic EA, even if the agencies later would make permitting determinations governed by Section 1456(c)(3). Id. at 66a-71a. Because the agencies had not conducted a consistency review before issuing the EA, the court concluded that the agencies had violated the CZMA. Id. at 65a.

The court of appeals reversed the district court's grant of summary judgment to the agencies and applicants on the NEPA claims, and it affirmed the grant of summary judgment to plaintiffs on the Endangered Species Act claim. As to NEPA, the court determined that the agencies had prepared an inadequate EA and had erroneously determined that an EIS was unnecessary. App., infra, 58a-59a. As to the Endangered Species Act, the court held that the EA qualified as "agency action" under that statute, thereby triggering the

agencies' duty to consult with the Fish and Wildlife Service. Id. at 59a; see 16 U.S.C. 1536(a)(2).

5. The court of appeals denied the petitions for rehearing filed by applicants and the agencies. App., infra, 77a-85a.

6. Counsel for applicants respectfully requests a 30-day extension of time, to and including January 25, 2023, within which to file a petition for a writ of certiorari. This case presents complex issues concerning the reviewability of EAs and the proper interpretation of the CZMA. The undersigned counsel was recently retained and requires additional time to review the record and opinions below. In addition, the undersigned counsel will be presenting oral argument in the Eleventh Circuit in International Construction Products, LLC v. Ring Power Corp., No. 22-10231 (Dec. 13, 2022). Undersigned counsel also is currently preparing a reply in support of a petition for certiorari in B-21 Wines, Inc. v. Bauer, No. 22-285; a petition for a writ of certiorari in United States v. Shapiro, No. 21-5 (due Jan. 10, 2023); an opening brief in the Eleventh Circuit in United States v. Bell, No. 22-12750 (due Dec. 19, 2022); and a reply brief in the Ninth Circuit in United States v. Fortenberry, No. 22-50144 (due Jan. 18, 2023). Counsel respectfully submits that an extension of time to prepare the petition in this case would allow applicants to coordinate with each other, to confer with the agencies, and to sharpen the issues for this Court's review.

Respectfully submitted.

KANNON K. SHANMUGAM
Counsel of Record
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300

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