

No. \_\_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS KELLER,

*Applicant,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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Application for Extension of Time Within  
Which to File a Petition for a Writ of Certiorari  
to the U.S. Court of Appeals for the Ninth Circuit

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APPLICATION TO THE HONORABLE  
ELENA KAGAN AS CIRCUIT JUSTICE

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## **APPLICATION FOR EXTENSION OF TIME**

Under this Court's Rule 13.5, Applicant Thomas Keller respectfully requests a 45-day extension of time within which to file a petition for a writ of certiorari, to and including March 20, 2026.

## **JUDGMENT FOR WHICH REVIEW IS SOUGHT**

The judgment for which review is sought is *United States v. Keller*, 142 F.4th 645 (9th Cir. 2025), attached as Exhibit 1. The Ninth Circuit's order denying panel and en banc rehearing is attached as Exhibit 2.

## **JURISDICTION**

This Court will have jurisdiction over any timely petition under 28 U.S.C. § 1254(1). The Ninth Circuit issued its judgment on June 27, 2025, and it denied a timely petition for rehearing on November 5, 2025. Thus, under Rule 13.1, a petition to this Court is currently due by February 3, 2026. In accordance with Rule 13.5, this application is being filed at least 10 days before that date.

## **REASONS JUSTIFYING AN EXTENSION OF TIME**

1. This case raises an important and recurring constitutional question: Whether the highly deferential "intelligible principle" test is all that restrains Congress from delegating its authority to the executive branch the authority to create the standard for criminal liability. Ex. 1 at 16–17. Specifically, Keller was a physician convicted of prescribing controlled substances outside the course of

professional practice, in violation of 21 U.S.C. § 841(a) and 21 C.F.R. § 1306.04(a). Ex. 1 at 19. Although the Controlled Substances Act generally prohibits distributing or dispensing controlled substances, *see* 21 U.S.C. § 841(a), the Act also explicitly exempts licensed physicians like Keller to prescribe controlled substances without criminal liability. *See id.*; 21 U.S.C. § 822(b). The Attorney General, however, promulgated a regulation which states that prescriptions for controlled substances are effective if “issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice” and purports to impose criminal penalties on the person issuing ineffective prescriptions. *See* 21 C.F.R. § 1306.04(a); *United States v. Feingold*, 454 F.3d 1001, 1003, 1011 & n.3 (9th Cir. 2006); *see also Ruan v. United States*, 597 U.S. 450, 454–55, 467 (2022).

Keller moved to dismiss the § 841(a) charges against him, arguing that the delegation of the authority to the Attorney General to promulgate § 1306.04(a), which set the substantive standard for criminal liability for physicians prescribing controlled substances, violated the nondelegation doctrine. He specifically maintained that a heightened standard applied to delegations of authority implicating criminal sanctions. Ex. 1 at 8, 16, 22. The Ninth Circuit rejected Keller’s argument, applying the ordinary “intelligible principle” test to his nondelegation challenge, relying on *United States v. Pheasant*, 129 F.4th 576 (9th Cir. 2025),<sup>1</sup> which held that the “exceedingly modest limitation” imposed by the intelligible-principle test is all that applies in the context of Congressional

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<sup>1</sup> This Court granted a 30-day extension of time to file a petition for a writ of certiorari in *Pheasant v. United States*, No. 25A727, which is currently due on February 28, 2026.

delegations that carry criminal penalties. Ex. 1 at 22; *see Pheasant*, 129 F.4th at 579–83. Although this Court has expressly declined to resolve the question of whether “something more than an ‘intelligible principle’ is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions,” *Touby v. United States*, 500 U.S. 160, 165–66 (1991), the Ninth Circuit in *Pheasant* held that nothing more was required, and rejected Keller’s argument on that basis. Ex. At 22; *see Pheasant*, 129 F.4th at 579–83.

This case is an ideal vehicle to address this long-simmering question of whether something more than the intelligible-principle test applies to Congressional delegations carrying criminal penalties. The standard for criminal delegations was pressed and passed upon below, and it is dispositive here.

2. An extension is warranted to allow counsel time to prepare adequately a petition that will aid the Court’s review of this important issue. Undersigned counsel is a busy public defender, and the press of other business has occupied his time during much of the initial 90-day period in which to file a petition. Specifically, undersigned counsel was occupied preparing for oral argument on December 10, 2025, in *United States v. DePape*, Nos. 24-3191 & 24-3458 (9th Cir.); preparing the opening brief in *United States v. Rollins*, Nos. 25-3701 & 25-3702 (9th Cir.), which is currently due on February 6, 2026; preparing a reply brief in *United States v. Hansen*, No. 25-3669 (9th Cir.), which is currently due on February 11, 2026. Undersigned counsel also took approximately three weeks of expiring leave over the winter holidays as well as time off to travel over the Thanksgiving holiday.

Undersigned counsel also has substantial administrative responsibilities, including overseeing hiring and supervision of law student interns, and coordinating appointment of counsel for all incoming motions for sentence reductions under 18 U.S.C. § 3582(a)(1)(A) in the district court. Undersigned counsel also frequently assists trial attorneys in the district court with briefing dispositive motions and complex sentencing matters. Given the novelty and complexity of the nondelegation issue, preparing this petition is especially time consuming. Finally, this petition will undergo review by multiple supervisors in my office, a lengthy process, and Applicant therefore requires additional time to comply with these procedures.

### CONCLUSION

For these reasons, Applicant respectfully requests a 45-day extension of time within which to file a petition for a writ of certiorari, to and including March 20, 2026.

January 22, 2026

Respectfully submitted,  
JODI LINKER  
Federal Public Defender  
Northern District of California



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TODD M. BORDEN\*  
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