No.

In The

Supreme Court of the United States

Solar Energy Industries Association; Invenergy Renewables, LLC; EDF Renewables, Inc.,

Applicants,

v.

United States; United States Customs and Border Protection; Troy Miller, Acting Commissioner for U.S. Customs and Border Protection.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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

APPLICATION FOR AN EXTENSION OF TIME

Pursuant to Rule 13.5 of the Rules of this Court, Applicants Solar Energy Industries Association (SEIA), Invenergy Renewables, LLC, and EDF Renewables, Inc. hereby request a 30-day extension of time within which to file a petition for a writ of certiorari, up to and including December 12, 2024.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *SEIA v. United States*, 86 F.4th 885 (Fed. Cir. 2023) (attached as Exhibit 1), as supplemented on panel rehearing by *SEIA v. United States*, 111 F.4th 1349 (Fed. Cir. 2024) (attached as Exhibit 2). The Federal Circuit granted the petition for panel rehearing and supplemented its original opinion with additional reasoning on August 13, 2024.

JURISDICTION

This Court will have jurisdiction over any timely filed petition for a writ of certiorari in this case pursuant to 28 U.S.C. § 1254(1). Under Rules 13.1, 13.3, and 30.1 of the Rules of this Court, a petition for a writ of certiorari is currently due to be filed on or before November 12, 2024. Under Rule 13.5, a Justice may extend the time to file the petition for a period not exceeding 60 days, if the application is filed for good cause at least 10 days before the date the petition is due. This application is being filed for good cause more than 10 days before the date the petition is due, and it seeks an extension for a period not exceeding 60 days.

REASONS JUSTIFYING AN EXTENSION OF TIME

Applicants' request for a 30-day extension of time within which to file a petition for a writ of certiorari seeking review of the decision of the Federal Circuit in this case, up to and including December 12, 2024, is supported by good cause for the following reasons.

1. In the Trade Act of 1974, Congress delegated to the President the power to impose emergency, temporary measures that can restrict imports in order to "safeguard" a domestic industry. 19 U.S.C. § 2251(a). It also gave the President the

power to "reduce[], modif[y], or terminate[]" such measures if the President "determines, after a majority of the representatives of the domestic industry submits to the President a petition requesting such reduction, modification, or termination on such basis, that the domestic industry has made a positive adjustment to import competition." *Id.* § 2254(b)(1)(B).

In early 2018, President Trump issued a safeguard measure on crystalline silicon photovoltaic (CSPV) solar energy products. 83 Fed. Reg. 3541 (Jan. 23, 2018). In June 2019, the U.S. Trade Representative (USTR) granted an exclusion from that measure for certain bifacial solar panels. 84 Fed. Reg. 27,684 (June 13, 2019). In October 2020, President Trump issued Proclamation 10101, which imposed safeguard duties on bifacial solar panels and increased the original duty rate on imported CSPV products (including bifacial panels). 85 Fed. Reg. 65,639 (Oct. 10, 2020). As authority, the President asserted that he had received a petition from the domestic industry requesting modifications to the safeguard measure. *Id.* at 65,640. The President did not find, however, that the petition relied on the domestic industry's "positive adjustment" to import competition, or that the industry "has made" a positive adjustment. 19 U.S.C. § 2254(b)(1)(B).

The Court of International Trade (Katzmann, J.) set aside Proclamation 10101 as unlawful. *SEIA v. United States*, 553 F. Supp. 3d 1322, 1343 (C.I.T. 2021). The court applied the Federal Circuit's judge-made rule that, in reviewing presidential action concerning international trade, the court should set aside such action as unlawful only if the President adopts a "clear misconstruction of the governing

statute." *Id.* at 1330 (quoting *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985)). Even under that standard, the proclamation "clearly misconstrued" Section 2254(b)(1)(B), which "permits only trade-liberalizing modifications to existing safeguard standards." *Id.* at 1343.

The Federal Circuit reversed. Relying on the "clear misconstruction" standard, which allows only "very limited" review, the court held that Section 2254(b)(1)(B) permits "trade-restrictive modifications *** as well." *SEIA*, 86 F.4th at 894-895, 898. The court also rejected Applicants' arguments seeking affirmance on alternate grounds—namely, that Proclamation 10101 did not satisfy statutory requirements because (1) the underlying industry petition failed to assert that the industry "has made a positive adjustment to import competition"; and (2) the President found only that the industry "has *begun* to make positive adjustment[s]" to import competition, *id.* at 898-899 (emphasis added), not that the industry "has made" such an adjustment. As to each, the court again reviewed the government's interpretations of the President's statutory obligations only for a "clear misconstruction." *See id.* at 899, 900.

Applicants petitioned for rehearing en banc on the ground that the "clear misconstruction" standard was incompatible with this Court's precedent. Rather than refer Applicants' petition to the en banc court, the panel "presumed" that the en banc petition "request[ed] relief that the panel could grant," and granted limited rehearing. ECF No. 109 (Aug. 13, 2024). The panel declined to revisit its deferential "clear misconstruction" standard, but instead supplemented its opinion with

additional reasoning to arrive at the same conclusions on *de novo* review. *See SEIA*, 111 F.4th at 1351.

This case presents three questions of statutory interpretation: (i) whether the President's Section 2254(b)(1)(B) authority to grant a requested "reduction, modification, or termination" of a safeguard once an industry has positively adjusted to competition includes the authority to further restrict (rather than liberalize) trade; (ii) whether such a modification can be based on a petition not asserting that the domestic industry has made a positive adjustment to import competition; and (iii) whether a finding that the industry "has begun to make" the required positive adjustment satisfies the requirement that the industry "has made" such adjustment. Notwithstanding the panel's *post hoc* attempt to rehabilitate its reasoning under a *de novo* standard, the answer to each question is clearly "no." And the questions are exceptionally important because they will determine the scope of the President's authority over trade issues that significantly impact the U.S. economy.

2. Counsel of record, James E. Tysse, seeks this extension of time because of the press of other client business. Counsel for Applicants have numerous litigation and administrative agency deadlines in the weeks leading up to and following the current deadline for the petition in this case:

- An opposition to a motion for a preliminary injunction in the Southern District of Florida in *Serpe v. FTC*, No. 0:24-cv-61939, on November 6, 2024.

- Assisting with oral argument in the Third Circuit in *Veterans Guardian VA Claim Consulting LLC et al. v. Platkin*, No. 24-1097, on November 8, 2024.

- Assisting with oral argument in the Seventh Circuit in *Central States, Southeast and Southwest Pension Fund v. Univar*, No. 24-1348, on November 15, 2024.

- An oral argument in the Court of International Trade in *Hyundai Steel Co. v. United States*, No. 23-00211, on November 19, 2024.

- A response brief in the Court of International Trade in *Auxin Solar Inc. v. United States*, No. 24-00006, on November 19, 2024.

- An opposition to a motion for a preliminary injunction in the Western District of Louisiana in *Wong v. Federal Trade Commission*, No. 6:24-cv-01410, on November 20, 2024.

- A complaint in the Court of International Trade in *Government of Israel, Ministry of Economy and Industry v. United States*, No. 24-00197, on November 25, 2024.

- An oral argument in the District Court for the District of Columbia in *Hesai Technology, Co., Ltd. v. U.S. Department of Defense*, No. 1:24-cv-01381, on November 26, 2024.

- A reply brief in the Court of International Trade in *POSCO v. United States*, No. 24-0006, on November 26, 2024.

- A reply brief in the Court of International Trade in *Canadian Solar International Limited v. United States*, No. 23-00222, on December 2, 2024.

- A remedy brief in the District of Colorado in *Save the Colorado et al. v. Graham*, No. 1:18-cv-03258-CMA, on December 6, 2024.

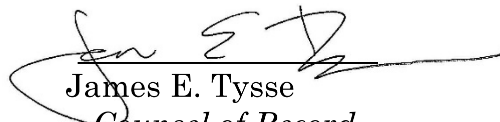
4. An extension would not cause prejudice to Respondent, because President Biden re-imposed safeguard duties on the previously excluded bifacial panels on a prospective basis following the Federal Circuit's decision, and thus an extension will not interfere with the current administration of the safeguard duties. 89 Fed. Reg. 53,333 (June 26, 2024). Collection of such duties will continue in the meantime, until the duty requirement terminates by law or this Court orders such termination. Moreover, the requested extension is unlikely to affect the Term

in which this Court would hear oral argument and issue its opinion if the petition were granted.

CONCLUSION

For the foregoing reasons, Applicants respectfully request that this Court grant an extension of 30 days, up to and including December 12, 2024, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,



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November 1, 2024

CORPORATE DISCLOSURE STATEMENT

Applicant Solar Energy Industries Association has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Invenergy Renewables, LLC, is 100% owned by Invenergy Renewables Holdings LLC. Neither is publicly traded. Blackstone Inc., a publicly traded company, owns 10% or more of Invenergy Renewables Holdings LLC.

Applicant EDF Renewables, Inc. has a parent company, EDF S.A., with a greater than 10% ownership interest.