No.

IN THE

Supreme Court of the United States

TOTAL GAS & POWER NORTH AMERICA, INCORPORATED; AARON TRENT HALL; THERESE NGUYEN TRAN,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION; CHAIRMAN KEVIN J. MCINTYRE, in his official capacity; COMMISSIONER CHERYL A. LAFLEUR, in her official capacity; COMMISSIONER NEIL CHATTERJEE, in his official capacity; COMMISSIONER ROBERT F. POWELSON, in his official capacity; COMMISSIONER RICHARD GLICK, in his official capacity; CHIEF ALJ CARMEN A. CINTRON, in her official capacity,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

MIGUEL A. ESTRADA
Counsel of Record
WILLIAM S. SCHERMAN
LUCAS C. TOWNSEND
MATTHEW S. ROZEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioners

QUESTION PRESENTED

Whether forcing an entity to defend claims for civil liability and penalties in an *ultra vires* agency proceeding, when "exclusive jurisdiction" of those claims lies in federal district court, presents a ripe case or controversy under Article III and the Declaratory Judgment Act as to the proper forum for adjudication.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were the plaintiffs-appellants below, are TOTAL Gas & Power North America, Inc. ("TGPNA"), Aaron Trent Hall, and Therese Nguyen Tran.

Respondents, who were the defendants-appellees below, are presently the Federal Energy Regulatory Commission ("FERC"); Chairman Kevin J. McIntyre, in his official capacity; Commissioners Cheryl A. LaFleur, Neil Chatterjee, Robert F. Powelson, and Richard Glick, each in his or her official capacity; and Chief Administrative Law Judge Cintron, in her official capacity.

Additional defendants-appellees below, who are not parties here, were former Commissioners Norman C. Bay, Tony Clark, and Colette D. Honorable, each in his or her official capacity. Commissioners Bay, Clark, and Honorable resigned their positions as commissioners of FERC.

Pursuant to Rule 29.6 of the Rules of this Court, TGPNA states that it is a wholly owned subsidiary of TOTAL Delaware, Inc., which is a wholly owned subsidiary of TOTAL Holdings USA, Inc. TOTAL Holdings USA, Inc. is a wholly owned subsidiary of TOTAL GESTION USA, which is a wholly owned subsidiary of TOTAL S.A. TOTAL S.A. is publicly held, and no other publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF APPENDICES

Page

TABLE OF APPENDICES
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Constitutional Provisions

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

TOTAL Gas & Power North America, Inc. ("TGPNA"), Aaron Trent Hall, and Therese Nguyen Tran (collectively, "petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit opinion under review (Pet. App. 1a-31a) is reported at 859 F.3d 325. The opinions and orders of the United States District Court for the Southern District of Texas (Pet. App. 32a-131a) are not reported but are available at 2016 WL 3855865 and 2016 WL 4800886. The order of the court of appeals denying rehearing (Pet. App. 132a-134a) is unreported.

JURISDICTION

The Fifth Circuit entered judgment on June 8, 2017. Petitioners' timely petition for rehearing en banc was denied on August 8, 2017. On October 30, 2017, Justice Alito extended the time for filing a petition for a writ of certiorari to December 6, 2017. On November 22, 2017, Justice Alito further extended the time for filing a petition for a writ of certiorari to January 5, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Constitution and the Natural Gas Act are reproduced at Pet. App. 137a-144a.

STATEMENT

This declaratory judgment action seeks to determine whether the Natural Gas Act ("NGA") means what it says by granting federal district courts "exclusive jurisdiction of violations" of that Act, and of "all suits in equity and actions at law" to "enforce any liability or duty created by" that Act. 15 U.S.C. § 717u. The Federal Energy Regulatory Commission ("FERC") has commenced an agency proceeding against petitioners in which it is purporting to use in-house adjudication before an administrative law judge ("ALJ") to make a binding determination that petitioners violated the NGA and impose hundreds of millions of dollars in civil penalties for those purported violations, subject only to deferential review by a federal court of appeals. But petitioners maintain that FERC lacks authority to adjudicate violations of the NGA and impose penalties, and that its ALJs are inferior officers who are not appointed in conformity with the Appointments Clause of the United States Constitution. If petitioners are correct, then FERC is exercising unauthorized and unconstitutional authority against petitioners in an *ultra vires* proceeding initiated with the purpose of imposing binding liability and penalties.

Petitioners therefore seek a declaration recognizing that FERC's authority is more circumscribed: FERC may conduct a hearing for the limited purpose of *proposing* a civil penalty amount, but it must then go to district court to try its allegations against petitioners to a jury or allow a neutral, Article III adjudicator to determine whether the proposed penalty is warranted. FERC's mistaken view of its authority vastly increases the stakes of the proceeding underway before it, and thus substantially increases the

burden and expense to petitioners of defending in that proceeding. Petitioners brought this action to avoid this substantial incremental expense by clarifying the scope of FERC's authority.

Notwithstanding the parties' sharp disagreement over the scope of the pending agency proceeding, the district court and a panel of the Fifth Circuit both concluded that petitioners' declaratory judgment action was not ripe. According to the Fifth Circuit panel, petitioners' declaratory judgment act claim was not ripe because their injury was not cognizable: The "litigation expenses" of defending in an unauthorized agency adjudication "cannot constitute sufficient hardship for ripeness." Pet. App. 27a. In the Fifth Circuit's view, petitioners will not have a ripe case or controversy until "FERC conclusively determines that Total has violated the NGA and imposes civil penalties against it." Pet. App. 20a. As a result of the Fifth Circuit's judgment, petitioners will be forced to defend FERC's claims in an *ultra vires* agency proceeding, risking the imposition of liability and binding civil penalties by an unconstitutionally appointed ALJ, before they can even ask an Article III tribunal to decide whether the federal district courts had exclusive jurisdiction all along.

The Fifth Circuit's ripeness holding conflicts with the decisions of multiple courts of appeals and this Court recognizing that the hardship of having to defend in an adjudicative proceeding in which the parties dispute the lawful scope of the adjudication is sufficient hardship for Article III ripeness. The petition should be granted to resolve the conflict.

1. In a series of New Deal-era regulatory statutes, Congress expressly gave federal district courts "exclusive jurisdiction" of "all suits in equity and ac-

tions at law brought to enforce any liability" under those statutes. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1568, 1571-72 & n.3 (2016) (citation omitted). In some of those statutes, Congress also expressly provided an exception to such jurisdiction by authorizing agency adjudication in certain defined circumstances. *E.g.*, 15 U.S.C. § 78u-2 (Exchange Act); 16 U.S.C. § 823b(d)(2) (Federal Power Act). This Court has explained, however that the statutes' underlying exclusive-jurisdiction provisions are "materially indistinguishable." *Manning*, 136 S. Ct. at 1571.

This case concerns one of those "exclusive jurisdiction" statutes: the Natural Gas Act, or NGA. *See* 15 U.S.C. §§ 717-717z.[1] When Congress enacted the NGA in 1938, it granted federal district courts "exclusive jurisdiction" of NGA "violations" and "all" actions to "enforce any liability or duty" under that statute. *Id.* § 717u. At the time, the consequences for "violations" of the NGA were limited to injunctive relief and criminal penalties, each imposed in a federal district court. *Id.* §§ 717s-717t. Unlike other New Deal statutes with exclusive jurisdiction provisions, at no time has the NGA included a provision authorizing agency adjudication of violations of the Act.

Congress amended the NGA in 2005 to provide for civil penalties for certain violations. NGA § 22 permits FERC to hold a "hearing" in order to "assess[]" a civil penalty, 15 U.S.C. § 717t-1(b), and

[1] The NGA is one of three core statutes that FERC administers along with the Federal Power Act ("FPA"), 16 U.S.C. §§ 791-828c, and the National Gas Policy Act, 15 U.S.C. §§ 3301-3432.

specifies the factors FERC may consider "[i]n determining the amount of a *proposed* penalty," *id.* § 717t-1(c) (emphasis added). At the same time, Congress renumbered the NGA's exclusive-jurisdiction provision as NGA § 24, leaving intact district courts' "exclusive jurisdiction" of NGA "violations" and "all" actions to "enforce any liability or duty" under the Act. *Id.* § 717u.

Congress drew the text of Section 22 from another of FERC's core statutes, the FPA. As with NGA § 24, FPA § 317 grants federal district courts "exclusive jurisdiction" of "violations of" the FPA or related rules, and "all suits in equity and actions at law" to "enforce any liability or duty created by" the statute or rules or "enjoin any [such] violation." 16 U.S.C. § 825p. And, as with the NGA, Congress left that provision in place when it added civil penalties for FPA violations in 1986. The new civil penalty provision, FPA § 31(c), directed FERC to "determin[e] the amount of a proposed penalty" and "asses[s]" that penalty "after notice and opportunity for public hearing," 16 U.S.C. § 823b(c)—the same key language Congress later borrowed for Section 22 of the NGA. Both statutes used that language to create a comparable intermediate step in which a "hearing" is held to "assess" *proposed* penalties.

Because neither provision—NGA § 22 or FPA § 31(c)—specified a method of adjudicating those penalties, in the absence of more specific provisions, the default rule of exclusive district court jurisdiction under NGA § 24 and FPA § 317 would control. But in the FPA Congress went further: It provided separately and expressly for administrative adjudication in Section 31(d). Under that provision, FERC must make a "determination of violation" "on the record"

after a formal "agency hearing pursuant to" the Administrative Procedure Act ("APA") before an ALJ. 16 U.S.C. § 823b(d)(2)(A). FERC then "assess[es] the penalty, by order," which is expressly made reviewable in the courts of appeals and enforceable without the need for district court adjudication. *Id.* § 823(d)(2)(A)-(B), (d)(5).[2]

Unlike the FPA, the NGA does not include an analogue to FPA § 31(d). Section 22, therefore, does not provide for any administrative tribunal to adjudicate violations as an alternative to the background rule of "exclusive" federal court jurisdiction, nor does it spell out the formal adjudication procedures that

[2] Even under the FPA, the accused retains the option to reject administrative adjudication and revert to the district court. *See* 16 U.S.C. § 823b(d)(1), (3). When the accused elects district court adjudication of FPA civil penalties—effectively standing on his FPA § 317 right to an Article III fact-finding—the accused may file "legal or factual arguments" challenging the proposed penalties. Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties, 117 FERC ¶ 61,317 at P 5.1 (2006) ("2006 Policy Statement"). FERC then "promptly assess[es]" the civil penalty it seeks by "order," and "institute[s] an action" in the appropriate federal district court to adjudicate the merits of its assessment. 16 U.S.C. § 823b(d)(2)(A)-(B). In that action, the district court must independently determine in "a trial *de novo* subject to the Federal Rules of Civil Procedure"—that is, "an ordinary civil action," *FERC v. Maxim Power Corp.*, 196 F. Supp. 3d 181, 191 (D. Mass. 2016)—whether a violation has occurred and whether FERC's proposed penalty is warranted, with "no deference" to FERC's assessment, *FERC v. MacDonald*, 862 F. Supp. 667, 672 (D.N.H. 1994). FERC's initial penalty assessment is not binding and cannot be enforced or collected—or reviewed in the federal courts of appeals, 2006 Policy Statement, P 5.2—until the district court "enter[s] a judgment enforcing" or "modifying, and enforcing as so modified," FERC's proposed penalties, 16 U.S.C. § 823b(d)(3)(B), (d)(5).

FERC would need to employ in such circumstances, or expressly provide for judicial review of the resulting administrative orders. The NGA contains *none* of this framework because (unlike the FPA penalty amendments) NGA § 22 does not contemplate *any* departure from the "exclusive jurisdiction" prescribed by NGA § 24.

2. FERC flatly rejects the view that federal district courts have exclusive jurisdiction to adjudicate NGA violations. Instead of bringing suit in a district court to prove alleged NGA violations, FERC asserts that Section 22 empowers it to hold in-house administrative proceedings to conclusively "determine whether a violation or violations occurred," 2006 Policy Statement, P 7.3, and that it may use ALJs to "adjudicat[e]" violations, including the appropriate penalties, without a federal district court ever being involved in those determinations, *see, e.g.*, *Energy Transfer Partners*, 121 FERC ¶ 61,282, at P 65 n.120 (2007) ("NGA section 22 provides for Commission adjudication of NGA civil penalties ...."). Although Section 22 was modeled on—and is substantially identical to—FPA § 31(c), FERC purports to find in Section 22 the distinct authority to adjudicate violations in-house that the FPA conferred separately in Section 31(d). Indeed, FERC contends—as it did in the proceedings below—that NGA § 22's provision for a "hearing" does not even require an ALJ hearing, or any sort of formal APA hearing (as does FPA § 31(d)), but may be satisfied by a "paper" hearing, with the burden of proof on the accused to show that penalties are not warranted.

FERC "initate[s]" these "enforcement proceedings" by issuing an order to show cause. Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156,

at PP 35-37 (2008) ("2008 Policy Statement"). The order shifts the burden of proof to the accused, who must "demonstrate that a violation did not occur" or, alternatively, why the accused should not be ordered to pay sizeable penalties, disgorge purportedly unjust profits, or both. *Id.*, PP 36-40.

FERC's own Commissioners then hear appeals from their ALJs' decisions. 2006 Policy Statement, P 7.4. After "determin[ing] that there is a violation," the Commission "issue[s] an order and may assess any appropriate penalty." *Ibid*. FERC insists that aggrieved parties must then submit to rehearing by the Commission before seeking judicial review. *Id*., P 7.5. FERC also maintains (*id*., P 7.6) that any eventual judicial review may occur only pursuant to NGA § 19(b), 15 U.S.C. § 717r(b)—the NGA provision that, since 1938, has governed review of *regulatory* "orders."[3] Under NGA § 19(b), a court of appeals

[3] Each of FERC's core statutes grants FERC two distinct types of authority, each with its own role for federal courts. First, FERC exercises traditional regulatory authority by issuing final "order[s]," *e.g.*, 15 U.S.C. § 717c(e), 16 U.S.C. § 824d(e), such as licensing or rate-making, that can be challenged in the federal courts of appeals and are subject to deferential review. The NGA provision that provides for this deferential court of appeals review of FERC regulatory orders is § 19(b). 15 U.S.C. § 717r(b). Second, FERC has statutory authority to investigate possible violations of its core statutes and initiate enforcement proceedings in federal district court. NGA § 14, for example, grants FERC authority to "investigate any facts" it finds "necessary or proper" for the appropriate body "to determine whether any person" has violated the NGA. *Id.* § 717m(a). In exercising its regulatory or investigative authority, FERC may hold "hearings" before its ALJs or the full Commission. *See, e.g.*, *id.* § 717n(e). But the power to investigate and hold hearings is not the power to adjudicate conclusively; FERC's core statutes reserve the latter for the federal district courts.

treats FERC's "finding[s]" of "facts" as "conclusive" "if supported by substantial evidence." *Ibid.* Moreover, the accused can be ordered to pay hundreds of millions of dollars even if the "preponderance of the evidence" shows that no violation occurred. *Columbia Gas Transmission Corp. v. FERC*, 448 F.3d 382, 385 (D.C. Cir. 2006) (substantial evidence standard requires "'less than a preponderance of the evidence'").

3. Petitioner TGPNA trades natural gas products in North America. FERC accuses TGPNA and two of its trading managers, petitioners Hall and Tran, of violating the NGA's anti-manipulation provision, NGA § 4A, 15 U.S.C. § 717c-1, and related rules, through trading of physical natural gas. In November 2015, FERC's Enforcement Staff formally recommended that FERC initiate enforcement proceedings and assess civil penalties against petitioners. Pet. App. 10a.

FERC subsequently accepted the Enforcement Staff's recommendation and issued an Order to Show Cause why petitioners should not be ordered to pay civil penalties totaling $216,600,000 and disgorge purportedly unjust profits of $9,180,000, plus interest. *TGPNA*, 155 FERC ¶ 61,105, at P 1 (2016). Pursuant to the show-cause order, the Enforcement Staff has urged FERC to make several conclusive factual findings, based on paper submissions alone, and set the matter "for a hearing" before a FERC ALJ to resolve all other factual issues. Reply, *TGPNA*, Docket No. IN12-17-000 (Sept. 23, 2016). Historically, FERC has always taken the actions urged by its Enforcement Staff with regard to civil penalties.

4. Petitioners filed this declaratory judgment action on January 27, 2016, three months before FERC issued its Order to Show Cause. They seek a judicial declaration that only a federal district court, not FERC, may adjudicate whether petitioners violated the NGA and owe civil penalties. Petitioners allege that conclusively adjudicating FERC's civil penalty claims through in-house enforcement proceedings would violate NGA § 24's grant to federal district courts of "exclusive jurisdiction of violations" of that statute and raise serious constitutional concerns under Article III, the Fifth and Seventh Amendments, and the Appointments Clause.[4]

Respondents moved to dismiss, arguing that the district court lacked subject-matter jurisdiction and that petitioners' claim was not ripe under the Fifth Circuit's decision in *Energy Transfer Partners, L.P. v. FERC*, 567 F.3d 134, 139 (5th Cir. 2009) ("*ETP*"). *ETP* held that the court lacked jurisdiction over a different type of proceeding: a petition under NGA § 19(b), 15 U.S.C. § 717r(b), seeking review of interlocutory FERC orders that had scheduled administrative proceedings to determine alleged NGA viola-

[4] Petitioners contend that FERC ALJs are inferior officers under the Appointments Clause who are improperly appointed by the FERC Chairman rather than the Commission acting collectively. The constitutionality of ALJ appointments is the subject of a widely publicized circuit split and two certiorari petitions currently before this Court. *Compare Raymond J. Lucia Cos., Inc. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016) (no Appointments Clause violation), *reh'g denied by equally divided court*, 868 F.3d 1021 (D.C. Cir. 2017) (per curiam), *petition for cert. filed* (U.S. July 21, 2017) (No. 17-130), *with Bandimere v. SEC*, 844 F.3d 1168, 1188 (10th Cir. 2016) (Appointments Clause violation), *petition for cert. filed* (U.S. Sept. 29, 2017) (No. 17-475).

tions. 567 F.3d at 141. In response, petitioners below pointed out that *ETP* was based on the narrower ripeness standard that applies by statute—under this Court's decisions in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), and *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 238 (1980)—to actions seeking review of "final agency action" under the APA and § 19(b). D.C. Dkt. 35, at 20. Petitioners explained that this standard does not apply here because petitioners rely on district court jurisdiction pursuant to NGA § 24 over the NGA violations that FERC alleges, and they seek declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, rather than "review" by a court of appeals under NGA § 19(b). *Ibid*.

The district court dismissed petitioners' lawsuit, holding that their claims are not justiciable and that the court lacked subject-matter jurisdiction. The court agreed with petitioners that *ETP* "is not dispositive here" because "a court of appeals' jurisdiction over a petition for review of an agency's administrative action is materially different from the issue of whether a district court has exclusive original jurisdiction over a declaratory judgment claim challenging the agency's authority to issue orders finding an NGA violation and assessing civil penalties." Pet. App. 84a-85a. Nevertheless, the court held in relevant part that petitioners' claims had yet to ripen because FERC might decline to move forward with enforcement proceedings. Pet. App. 87a-91a.

5. On appeal, petitioners argued that they suffered harm, giving rise to a ripe controversy, from the substantial additional burden and expense (regardless of the outcome) of having to defend in an unauthorized agency proceeding already underway

where the purported outcome is an adjudication of whether petitioners violated the NGA and must pay hundreds of millions of dollars in penalties, with only deferential judicial review. *See* Pet. C.A. Br. 54-55 (citing *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 n.2 (2010); *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998)). While noting that FERC may conduct a preliminary *investigative* proceeding "to refine its allegations"—as it does under the FPA—petitioners emphasized that "the result of that hearing lacks binding force" and merely establishes the predicate—*i.e.*, "proposed" penalties—for filing a lawsuit in federal district court. *Id.* at 35. Here, petitioners argued, FERC's guidance leaves no doubt that the agency proceeding already underway seeks conclusively to "determine whether a violation or violations occurred." *Id.* at 15 (quoting 2006 Policy Statement, P 7.3).

A panel of the Fifth Circuit affirmed the district court's ripeness holding but divided on the reasoning. The majority recognized that if FERC continues to move forward with administrative proceedings aimed at "a definitive finding of liability and binding imposition of a penalty," petitioners "will put more effort into defending [themselves]"—resulting in greater litigation costs—than if FERC's authority were limited to investigating and proposing a penalty as a predicate to litigating its claims in federal district court. Pet. App. 27a. Nevertheless, the majority and concurrence each concluded—for different reasons—that this incremental cost of defending in a proceeding that seeks to adjudicate petitioners' liability and impose binding civil penalties is not an injury that can make petitioners' claims ripe.

The majority ruled that *ETP* "controls" the outcome, Pet. App. 19a, because *ETP* concluded that "the litigation expenses of participating in the FERC proceedings … cannot constitute sufficient hardship for ripeness," Pet. App. 27a. The majority further concluded that petitioners' reliance on *Stolt-Nielsen* and *Sea-Land* was "refuted" by petitioners' concession that FERC can conduct an *investigative* proceeding to assess a civil penalty before bringing any action in the district court. Pet. App. 25a-26a.

Judge Jolly, concurring in the judgment, wrote separately to note his "concerns with the majority's reliance on [*ETP*]" because "the *ETP* court applied a different standard from the standard that must be applied to this case." Pet. App. 30a. Nevertheless, Judge Jolly concluded that the case was unripe because he believed, like the majority, that FERC was authorized to conduct an *investigative* proceeding to assess a civil penalty before bringing any action in the district court and thus "the FERC proceedings up to this point are not *ultra-vires*." *Ibid*. Although Judge Jolly cited *Stolt-Nielsen* in passing, he did not address the significance of the posture in which that case arose, or recognize it as authority for finding ripeness in a challenge to "an arguably inefficient though not *ultra-vires* proceeding." Pet. App. 30a-31a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision means that even where Congress has expressly given federal district courts "exclusive jurisdiction" of alleged statutory violations and penalties, an agency can usurp that jurisdiction with impunity, forcing a defendant into a years-long administrative proceeding and threatening to impose binding liability and crushing penal-

ties, subject only to deferential "review" by a court of appeals, before the defendant can even *ask* an Article III court to decide whether a district court should have adjudicated the matter all along. That decision makes a mockery of federal courts' exclusive jurisdiction, renders the Declaratory Judgment Act a nullity, and turns Article III ripeness principles on their head. It also conflicts sharply with decisions of other circuits and this Court holding that forcing a party to participate in an unauthorized adjudicative proceeding creates cognizable injury for purposes of Article III ripeness. This Court's review is urgently needed.

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS' HOLDINGS THAT THE BURDEN AND EXPENSE OF PARTICIPATING IN AN ADDITIONAL PROCEEDING CREATES SUFFICIENT HARDSHIP FOR ARTICLE III RIPENESS

The Fifth Circuit's decision cannot be reconciled with the decisions of multiple courts of appeals that have allowed litigants to seek relief aimed at avoiding or reducing the burden and expense of adjudication. Courts outside the Fifth Circuit have consistently recognized that the cost of participating in an additional proceeding is a cognizable Article III injury that federal courts may redress without waiting for an adverse result in the proceeding at issue.

In *International Brotherhood of Electrical Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988) ("*IBEW*"), for example, the D.C. Circuit allowed a challenge to an agency's authority to review arbitral awards based solely on the challenger's interest in avoiding agency review in future cases. After a union successfully arbitrated an employee grievance, the Interstate Commerce Commission ("ICC") held—over the union's objection—that it had jurisdiction to review

the award, which it ultimately upheld. *Id*. at 333. The D.C. Circuit held that although the union had "prevailed" before the agency, it had standing to challenge the ICC's assertion of "authority to review arbitration decisions" because the ruling would "forc[e] [the union] to litigate future arbitration awards before the ICC" and "incur the costs of resisting challenges to arbitration awards and the delays such reviews entail." *Id.* at 334-35. As the D.C. Circuit explained in a later case, the ICC's "decision did not suggest that petitioners would lose future litigation; it ensured that future litigation would be more costly, no matter how often petitioners prevailed," and this "concrete cost of an additional proceeding is a cognizable Article III injury." *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998). The union's interests in avoiding that injury warranted "immediate adjudication," moreover, without waiting for a merits ruling against the union; the appeal was therefore "ripe." *IBEW*, 862 F.2d at 335.

The Fifth Circuit majority's refusal to consider the "expenses of participating in the FERC proceedings," Pet. App. 27a, cannot be squared with *IBEW* and *Sea-Land*'s recognition that such expenses are "cognizable" under Article III, *Sea-Land*, 137 F.3d at 648, and that an action seeking to avoid them may ripen before the challenged proceeding results in an adverse ruling, *IBEW*, 862 F.2d at 335.

Multiple decisions involving the enforcement of forum-selection clauses reflect the same principles. In *J.P. Morgan Chase Bank, N.A. v. McDonald*, 760 F.3d 646 (7th Cir. 2014), for example, a bank sued to enforce a forum-selection clause that it claimed barred an ongoing arbitration against two of its affil-

iates. *Id.* at 648-49. The Seventh Circuit held that the bank had standing to enforce the forum-selection clause—and insist that the dispute be litigated in the contractually selected court—even though the bank was not "a party to the arbitration." *Id.* at 650. The court of appeals reasoned that the bank had agreed to "foot the bill" for its affiliates' "litigation-related expenses," and that this injury was sufficient to confer standing even though the arbitration was "ongoing" and there was no arbitral award adverse to the bank. *Id.* at 649-51 (citation omitted).

Similarly, the Second Circuit has held that a district court properly exercised subject-matter jurisdiction to declare the exclusive forum for litigation under the parties' forum-selection clause. *Farrell Lines Inc. v. Ceres Terminals Inc.*, 161 F.3d 115, 116 (2d Cir. 1998) (per curiam). In the district court, the plaintiff, who had been sued in Italy, sought a declaration that a forum-selection clause requiring that the action proceed in New York was valid. *See Farrell Lines Inc. v. Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118, 124 (S.D.N.Y. 1997). The district court held that the action presented a justiciable "actual controversy," and that the court had jurisdiction to award declaratory relief in order to "terminate plaintiff's uncertainty as to the validity of the Italian litigation." *Ibid*. The Second Circuit affirmed "[f]or substantially the same reasons as those stated by the district court." *Farrell Lines*, 161 F.3d at 116.

Additionally, the Eighth Circuit recently affirmed a holding that a party suffers irreparable harm when it is forced to litigate in a forum in which it did not consent to jurisdiction. *See Enerplus Res. (USA) Corp. v. Wilkinson*, 865 F.3d 1094, 1097 (8th Cir. 2017). The district court enjoined the defendant

from litigating its claims in tribal court on the ground that such litigation was precluded by a forum-selection clause governing the dispute. *Enerplus Res. (USA) Corp. v. Wilkinson*, 2016 WL 8737869, at *5 (D.N.D. Aug. 30, 2016). The court found an injunction warranted because the plaintiff would suffer "irreparable harm" if "forced to engage in expensive and time-consuming litigation in a forum it did not bargain for." *Id.* at *4. The Eighth Circuit affirmed, finding the district court's analysis of the plaintiff's injury "sound." 865 F.3d at 1097.

J.P. Morgan, *Farrell Lines*, and *Enerplus* each recognize that a litigant facing the burden and expense of participating in litigation or arbitration in the wrong forum has a cognizable interest in avoiding that forum and obtaining immediate relief recognizing the proper forum. Each of these decisions recognized the availability of immediate relief without waiting to see if the wrong forum would issue an adverse judgment against the plaintiff. Indeed, *Enerplus* recognized that the harm from litigating in the wrong forum is "irreparable" absent immediate relief. 2016 WL 8737869, at *4; *see also Enerplus*, 865 F.3d at 1097 (holding that the district court "did not legally err"). Those holdings are directly at odds with the Fifth Circuit's conclusion that the petitioners' interest in determining the proper forum to conclusively adjudicate FERC's allegations "cannot constitute sufficient hardship" to permit relief. Pet. App. 27a.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *STOLT-NIELSEN* AND *MEDIMMUNE*

The Fifth Circuit's decision also contradicts this Court's precedents. The decision is in direct conflict

with *Stolt-Nielsen SA v. AnimalFeeds International Corp.*, 559 U.S. 662, 671 n.2 (2010), in which this Court held that the hardship of having to defend in an adjudicative proceeding in which the parties disputed the scope of the adjudication is "sufficient hardship" for Article III ripeness. And by extending the Fifth Circuit's earlier *ETP* decision outside the context in that case—a proceeding seeking judicial review of final agency action—the majority ignored the ripeness standard applicable, under *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), to declaratory judgment claims.

1. *Stolt-Nielsen* arose as a dispute between a shipper (purporting to represent a class of other shippers) and a group of shipping companies. There was no question that the parties had agreed to arbitrate any disputes. 559 U.S. at 668 ("The parties agree that … AnimalFeeds and petitioners must arbitrate their antitrust dispute."). However, the parties' arbitration agreement was silent with respect to whether the arbitration could proceed as a *class* arbitration. *Ibid.* When the arbitrators concluded that the arbitration clause permitted class arbitration, the shipping companies sought judicial review and an order vacating that partial arbitration award. *Id.* at 669. The sole merits question presented to the Supreme Court was whether the arbitration—which all parties agreed was authorized—could proceed as a class arbitration. *Id.* at 666.

Over a three-Justice dissent, the Court held that the disputed character of the arbitration presented a ripe controversy. 559 U.S. at 671 n.2. The dissenting Justices would have declined to reach the merits, believing that the arbitrators' award was "preliminary" because it did not even purport to determine

whether the asserted claims "were suitable for class resolution." *Id.* at 690 & n.4 (Ginsburg, J., dissenting). But the majority summarily rejected that argument in a footnote, holding that the action was ripe because "[t]he arbitration panel's award means that petitioners must now submit to class determination proceedings before arbitrators who, if petitioners are correct, have no authority to require class arbitration." *Id.* at 671 n.2. The Court reasoned that the imminent "hardship"—*i.e.*, the additional burden and expense—of having to submit to participate in that "ultra vires proceeding" was a cognizable injury ripe for adjudication under both the constitutional and prudential prongs of ripeness doctrine. *Ibid.* Moreover, that holding was necessary to the Court's decision, because it rejected the dissent's rationale for finding the action "preliminary" and unripe.

Stolt-Nielsen thus squarely refutes the majority's holding that "litigation expenses" from defending in an unauthorized adjudicative proceeding "cannot constitute sufficient hardship for ripeness." Pet. App. 27a. The "hardship" that made the action in *Stolt-Nielsen* ripe was nothing other than litigation expenses—the costs and burdens of "submit[ting] to class determination proceedings." 559 U.S. at 671 n.2. Indeed, the injury here is even more concrete. In *Stolt-Nielsen*, an adjudication would have to occur on the shipper's individual claim *regardless* of the ultimate determination on class suitability and liability to the class. Here, FERC would not be permitted to conduct *any* binding adjudication under petitioners' reading of NGA § 22.

2. The panel declined to follow *Stolt-Nielsen* because both the majority and concurrence believed that petitioners had "concede[d] that FERC is au-

thorized to conduct a proceeding regarding the alleged violation and penalty *prior* to any action being brought in the district court." Pet. App. 20a; *see also* Pet. App. 30a (Jolly, J., concurring in judgment). That rationale misapprehends *Stolt-Nielsen* and misconstrues the NGA. As noted, both parties in *Stolt-Nielsen* conceded that some type of arbitration would occur; it was the *scope* of the adjudication that created "hardship" and a ripe controversy. Neither the majority nor Judge Jolly acknowledged this crucial aspect of *Stolt-Nielsen*.

Here, petitioners have merely recognized that FERC has authority to hold an abbreviated in-house "public hearing" to refine its allegations, as it does in other enforcement contexts. *See* 2006 Policy Statement, P 5.1. It does not follow, however, that FERC's ability to conduct an investigative hearing to assess the amount of a "proposed penalty" means that FERC's proceeding against petitioners is "not ultra-vires," as the majority and concurrence incorrectly assumed. Pet. App. 30a.

Quite the contrary, FERC's show-cause order forces Plaintiffs into an adjudication that FERC lacks authority to conduct. "From the earliest history of the government the jurisdiction over actions to recover penalties and forfeitures has been placed in the District Court." *Lees v. United States*, 150 U.S. 476, 478 (1893). Where "a statute imposes a penalty and forfeiture," jurisdiction therefore "vest[s] in the District Court, unless it is in express terms placed exclusively elsewhere." *Id*. at 479. Throughout the long history of FERC's core statutes, Congress has preserved the traditional role of the district courts by granting those courts "exclusive jurisdiction of violations" of the NGA and FPA. 15 U.S.C. § 717u; 16

U.S.C. § 825p. Section 24's grant of "exclusive jurisdiction of violations" to federal district courts, 15 U.S.C. § 717u, thus establishes the default rule against which the NGA's civil penalty provisions must be construed: Only federal district courts, not FERC, have authority to adjudicate the NGA "violations" for which "penalties" may be imposed. Congress did not modify NGA § 24 when it added civil penalties to the NGA, and "repeals by implication are not favored," and will not be presumed unless the "intention of the legislature to repeal [is] clear and manifest." *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981) (quotation marks omitted).

Because NGA § 22—the provision adding civil penalties—does not clearly manifest Congress's intention to roll back NGA § 24, NGA § 22 preserves the district court's jurisdiction over violations, and FERC cannot obtain the civil penalties it seeks without proving its allegations in a district court. Unlike FPA § 31(d)(2), which permits formal APA adjudication of civil penalties for FPA violations in limited circumstances, NGA § 22 neither directs nor permits FERC to make a binding "determination of violation" in "an agency hearing." 16 U.S.C. § 823b(d)(2). Instead, NGA § 22 merely directs FERC to "determin[e] the amount of a *proposed* penalty" and "asses[s]" that penalty "after notice and opportunity for public hearing." 15 U.S.C. § 717t-1 (emphasis added).

The FPA make clears that a FERC-proposed penalty assessment is not an independently enforceable order. The relevant terminology in NGA § 22 is the same as that in FPA § 31(c), which directs FERC to "determin[e] the amount of a *proposed* penalty" and "asses[s]" that penalty "after notice and oppor-

tunity for public hearing." 16 U.S.C. § 823b(c) (emphasis added). That is not the wording Congress uses to divest district courts of jurisdiction to adjudicate violations, because in the FPA the same step is followed by a district court adjudication if the accused so elects. FERC's role, instead, is limited to conducting an informal hearing—where the accused may file arguments in defense—before FERC assesses a *proposed* penalty. That penalty is unenforceable until FERC proves its case in "an ordinary civil action" in a district court. *FERC v. Maxim Power Corp.*, 196 F. Supp. 3d 181, 191 (D. Mass. 2016); *see supra*, at 6 n.2.

Conversely, in the limited circumstances in which the FPA permits in-house APA adjudication of civil penalties, FERC's assessment has binding effect only because provisions *other than* FPA § 31(c) *expressly* give it that effect. Specifically, in those circumstances, FPA § 31(d)(2)(B) permits an appeal of FERC's assessment to the courts of appeals, under a deferential APA standard, and FPA § 31(d)(5) permits collection once FERC's assessment becomes "unappealable"—that is, once it is affirmed on appeal *or* the accused declines to appeal. 16 U.S.C. § 823b(d)(2)(B), (5). The NGA does *not* have these provisions. Thus, in every FERC civil penalty action apart from the express exception in the FPA and in which Congress expressly enacted an APA adjudication process, an "assessment" lacks binding effect unless and until FERC obtains a district court judgment. FERC "assess[es]" proposed civil penalties for "violations" of the NGA, 15 U.S.C. § 717t-1, and then brings enforcement actions in federal district courts, which have "exclusive jurisdiction" of those "violations" and of "action[s] to enforce any liability" under the NGA, *id*. § 717u.

The NGA does not bar FERC from first holding an abbreviated in-house "public hearing" to refine its allegations—comparable to the informal hearing it holds before proceeding to district court under FPA § 31(d)(3). *See* 2006 Policy Statement, P 5.1. But the result of that hearing lacks binding force, just as it lacks binding force under the FPA. To hold otherwise would mean that Congress authorized potentially exorbitant penalties—"$1,000,000 per day per violation," 15 U.S.C. § 717t-1—without directing FERC to employ the *formal* adjudication procedures under the APA that typically attend agency adjudication of such significant penalties, and that require the agency to bear the burden of proof, 5 U.S.C. § 556(d). And it would mean that Congress did so in the NGA alone, after requiring formal APA adjudication in the limited circumstances in which the FPA expressly carves out from the district courts' "exclusive jurisdiction." *See* 16 U.S.C. § 823b(d)(2) (requiring a "hearing pursuant to [APA § 5, 5 U.S.C. § 554,] before an [ALJ]"). The penalty that FERC now seeks from Plaintiffs—*more than $200 million*—highlights the contrast between the FPA and NGA § 22, which does not even reference the APA's formal adjudication provision or use the phrase "on the record" to trigger such adjudication. FERC has identified no other statute that provides for administrative adjudication of remotely comparable civil penalties without expressly providing for a full trial in a federal district court or formal "on the record" adjudication.

Despite these limitations, FERC has initiated administrative proceedings that seek not merely to refine its allegations against petitioners and propose a penalty, but also to usurp the exclusive jurisdiction of the federal district courts by conclusively adjudicating whether petitioners have violated the NGA

and whether civil penalties are warranted. Under FERC's regulations, an order to show cause "initate[s] enforcement proceedings," 2008 Policy Statement, PP 35-37, the purpose of which is to "determine whether a violation or violations occurred," 2006 Policy Statement, P 7.3. FERC's regulations further characterize its penalty assessment as a "final Commission order" appealable to the courts of appeals under NGA § 19(b)—not as a proposed penalty that must be adjudicated in federal district court. 2006 Policy Statement, P 7.6.

As in *Stolt-Nielsen*, the parties' dispute over the *scope* of FERC's proceeding gives rise to a ripe controversy. FERC's limited authority to "investigate" facts, 15 U.S.C. § 717m, and to make a record to "determin[e] the amount of a proposed penalty," *id.* § 717t-1(c), does not defeat ripeness. There is a world of difference between the proceedings that Congress allows FERC to hold, and the proceeding that FERC's show-cause order commences with the unlawful purpose of both prosecuting *and* adjudicating conclusively those alleged violations in-house. The proceeding commenced by FERC's show-cause order is no less *ultra vires* than the class portion of the arbitration in *Stolt-Nielsen*, and the incremental "expense" that the majority acknowledges that petitioners will incur as a result of that proceeding, Pet. App. 27a, is precisely the type of "hardship" that *Stolt-Nielsen* found "sufficient" to make an action ripe, 559 U.S. at 671 n.2.

The panel also believed that the case is not ripe because future events might occur in the FERC proceeding that could allow petitioners to avoid liability or the imposition of penalties. Pet. App. 21a-22a; Pet. App. 30a (Jolly, J., concurring in judgment).

But the same was true in *Stolt-Nielsen*. The arbitrators had determined only that the arbitration was *eligible* for class adjudication, *see* 559 U.S. at 669, and had not yet found that the claims were "suitable for class resolution," *id.* at 690 (Ginsburg, J., dissenting). The arbitrators might still decline to certify a class or might find non-liability to the class; yet even in that posture, the Court found the judicial challenge ripe because the arbitrators had decided a disputed question on the arbitration's scope. Of course, it is always *possible* in Declaratory Judgment Act lawsuits that the anticipated coercive lawsuit might not be brought or might not succeed. Such possibilities do not mean that the parties' controversy is not sufficiently defined and immediate now.

3. *Stolt-Nielsen*'s ripeness holding is consistent with longstanding authority addressing ripeness in declaratory judgment actions. In *MedImmune*, the Supreme Court reaffirmed that "where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced." 549 U.S. at 128-29. Here, FERC has not merely threatened to enforce the NGA; it has initiated a proceeding to enforce that statute and adjudicate liability and civil penalties. Petitioners' Declaratory Judgment Act lawsuit challenges the lawful basis for that agency proceeding. As in *MedImmune*, the standard for ripeness is satisfied: There is "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 127 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). That is all Article III requires in this context.

Rather than apply the *MedImmune* standard, the panel majority rested its holding on its prior decision in *ETP*. Pet. App. 19a-20a. In *ETP*, the Fifth Circuit applied a distinct standard: the *statutory* ripeness standard that applies, under this Court's decisions in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), and *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980), to actions seeking review of "final agency action" under the APA and NGA § 19(b). *ETP*, 567 F.3d at 140 (citation omitted). Disagreeing with the district court, Pet. App. 84a, and over the express disagreement of Judge Jolly, Pet. App. 30a, the majority found *ETP* "control[ling]" even outside the APA and NGA § 19(b) context.

The majority's application of *ETP* to this case represents a dangerous expansion of *Abbott* and *Standard Oil* that conflicts directly with this Court's holdings in those cases. Both decisions addressed the statutory requirements for judicial review under Section 10(c) of the APA, which authorizes review of "final agency action" but does not provide for interlocutory review of "preliminary, procedural, or intermediate agency action." 5 U.S.C. § 704; *see Abbott*, 387 U.S. at 149; *Standard Oil*, 449 U.S. at 234. This Court's holdings in those cases addressing the "'finality' element," *Abbott*, 387 U.S. at 149, are limited to actions seeking judicial review of final agency action.

In *Abbott*, the plaintiffs sought review under the APA of regulations promulgated by the federal Commissioner of Food and Drugs. 387 U.S. at 138. Relying on "cases dealing with judicial review of administrative actions," this Court held that the regulations were "ripe" for review because they qualified as "'final agency action'" under APA § 10(c). *Id.* at

149-50. The Court reasoned that the regulations under review represented the agency's "definitive" position on the issue under review and that the question presented on the merits was a purely "legal issue" on which no further fact development was needed. *Id*. at 151, 153.

This Court applied the same test in *Standard Oil*, this time holding that the "issuance of [a] complaint" by the Federal Trade Commission was not "'final agency action'" and thus was not "subject to judicial review" under APA § 10(c). 449 U.S. at 233, 235. The Court emphasized that the "issuance of a complaint" did not reflect the Commission's "definitive ruling" on the issue sought to be reviewed—the Commission's preliminary determination that it had "reason to believe" the statute at issue had been violated. *Id.* at 243. The Court also considered whether the Commission's action might nonetheless be subject to judicial review, despite the absence of final agency action, on the grounds that the issuance of the complaint would cause "irreparabl[e] har[m]" because "the burden of defending against th[e] proceeding [initiated by the complaint] w[ould] be substantial." *Id.* at 244. Concluding that "'mere litigation expense … does not constitute irreparable injury,'" the Court held that the such expenses alone do not justify "immediat[e]" "judicia[l] revie[w]" in the absence of final agency action. *Ibid*.

In *ETP*, the Fifth Circuit applied *Abbott* and *Standard Oil* to a proceeding seeking "judicial review" of agency action, this time under NGA § 19(b). 567 F.3d at 139. The petitioner sought review of two FERC orders setting alleged NGA violations for administrative proceedings, but the Fifth Circuit held that it lacked jurisdiction. *Id.* at 140-44. As in

Standard Oil, the Fifth Circuit rejected the petitioner's attempt to show that the orders "should be accorded finality" for purposes of allowing immediate judicial review on the theory that absent such review, the petitioner would incur substantial litigation expenses in an unlawful agency proceeding, and would thus suffer "irreparable injury." *Id.* at 141-42. "[E]xpected litigation expenses," *ETP* explained, "d[o] not constitute *irreparable* injury." *Id.* at 142 (quoting *Standard Oil*, 449 U.S. at 244) (emphasis added).

As both the district court and Judge Jolly recognized, none of these decisions applies to petitioners' claim here. The "ripeness of agency action for judicial review"—the question in *Abbott*, *Standard Oil*, and *ETP*—is a "distinct inquiry" from the ripeness of a "declaratory judgment action," which requires only that there is a "a substantial controversy of sufficient immediacy and reality … between parties having adverse legal interests." Pet. App. 29a-30a (Jolly, J., concurring in judgment) (citation omitted). The two inquiries are "materially different," as the district court put it, because a party who is not seeking "review of an agency's administrative action," Pet. App. 84a, need not show that the agency has taken "final agency action," 5 U.S.C. § 704, or overcome the absence of final agency action by showing "irreparable injury," *Standard Oil*, 449 U.S. at 244 (citation omitted). It is thus irrelevant whether "litigation expense[s]" meet the heightened standard to qualify as "*irreparable* injury." *Ibid*. (emphasis added; citation omitted). It is enough that, as multiple courts of appeals—and this Court in *Stolt-Nielsen*—have recognized, those expenses create an injury cognizable under Article III.

The panel majority conceded that *ETP*'s "ripeness analysis" "is not identical to the analysis for declaratory judgments." Pet. App. 24a. Its attempt to "nevertheless shoehorn this case into *ETP*'s holding"—and into the framework applicable under *Abbott* and *Standard Oil*—is misguided. Pet. App. 29a-30a (Jolly, J., concurring in judgment). There is no reason to require finality or irreparable harm outside of the context of an action seeking judicial review of final agency action. Because petitioners face substantial incremental litigation expenses that would be avoided by the declaration petitioners seek, there is "a substantial controversy" of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment," *MedImmune*, 549 U.S. at 127 (citation omitted), and this action is ripe.

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

This Court's review is needed to resolve the conflict that the Fifth Circuit's decision creates over when an action seeking to enforce a forum's exclusive jurisdiction presents a ripe case or controversy under Article III and the Declaratory Judgment Act. Actions to avoid the concrete costs of an *ultra vires* proceeding arise in a variety of contexts, including in the arbitration context, as in *Stolt-Nielsen*; the enforcement of forum-selections clauses, as in *J.P. Morgan*, *Farrell Lines*, and *Enerplus*; and the administrative context, as in *IBEW*, *Sea-Land*, and this case. The question of whether those costs are a cognizable injury under Article III therefore has broad implications for federal courts' jurisdiction and immense practical consequences for the parties forced to incur those costs.

This case is an excellent vehicle to resolve this question because Congress has expressly vested "exclusive jurisdiction" of alleged NGA violations and civil penalties in the federal district courts. As a result of the Fifth Circuit's decision, however, petitioners would be forced to defend themselves for years in an agency proceeding that seeks to impose binding liability and hundreds of millions of dollars in penalties, with their only recourse being a court of appeals' deferential review of the administrative record. And while a court of appeals might someday conclude that the district courts had exclusive jurisdiction from the outset, that remote possibility would do nothing to redress the ongoing injury that petitioners are presently suffering from defending themselves against liability and penalties in an *ultra vires* proceeding.

The question presented is also particularly important here because petitioners' Declaratory Judgment Act claims seek resolution of a recurring question about the proper forum for adjudicating civil penalties under the NGA, which might otherwise escape review if the Fifth Circuit's limited approach to ripeness is allowed to prevail. The threshold question in any NGA civil penalty proceeding is whether that proceeding is being conducted in the proper forum, but prior attempts to seek judicial resolution of this question have not resulted in clarity. In *ETP*, for example, another natural gas company challenged FERC's authority to seek NGA civil penalties against it by seeking review of two FERC orders setting alleged NGA violations for administrative proceedings, but the Fifth Circuit held that it lacked jurisdiction. 567 F.3d at 140-44. ETP then settled its claims before any Article III tribunal passed on the threshold question of the proper forum to adjudi-

cate NGA civil penalties. *ETP*, 128 FERC ¶ 61,269 (2009). *ETP* demonstrates the intense pressure to settle that parties accused of violating the NGA face when confronted with the risk that FERC will impose hundreds of millions of dollars in penalties through its own in-house proceedings subject only to deferential review in the court of appeals. If the Fifth Circuit's decision is allowed to stand, there is no assurance that any federal court will pass on the critical question that petitioners brought this action to resolve.

By refusing to consider petitioners' exclusive-jurisdiction argument, the Fifth Circuit effectively denied that argument on its merits, albeit without claiming to do so. The entire purpose of placing *exclusive* jurisdiction in district courts is frustrated when a defendant cannot invoke that jurisdiction until after it has submitted to *another* tribunal's jurisdiction. Yet, in the Fifth Circuit's view, petitioners must litigate FERC's claims to a final and purportedly binding decision in the agency's in-house court before asking a court of appeals to decide whether those claims instead should have been litigated in the district court. The coercive effect of requiring petitioners to risk liability and massive penalties as the price to pay for asserting their rights is exactly the type of injury the Declaratory Judgment Act was designed to prevent. *See, e.g.*, *MedImmune*, 549 U.S. at 129 ("The dilemma posed by" the "coercion" of "putting the challenger to the choice between abandoning his rights or risking prosecution … is a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.").

Granting review in this case is also critically important because petitioners' jurisdictional challenge

implicates several significant constitutional issues currently before this Court. Petitioners contend that FERC ALJs are inferior officers under the Appointments Clause who are improperly appointed by the FERC Chairman rather than the Commission acting collectively as the head of a department. The constitutionality of ALJ appointments is the subject of two pending petitions for certiorari. *See Lucia v. SEC*, No. 17-130 (petition filed July 21, 2017); *SEC v. Bandimere*, No. 17-475 (petition filed Sept. 29, 2017). The Solicitor General recently recognized the "critica[l] importan[ce]" of this issue in *Lucia* while conceding that SEC ALJs are inferior officers under the Appointment Clause who must be appointed by the Commission acting collectively. Resp. Br., *Lucia v. SEC*, No. 17-130 (Nov. 29, 2017). As the Solicitor General explained, FERC employs ALJs "in a manner similar to the [SEC]," *id.* at 25-26, meaning that the manner of appointment of FERC ALJs violates the Appointments Clause for the same reasons as the manner of appointment of SEC ALJs. The unconstitutional appointment of FERC's in-house adjudicator is all the more reason why petitioners' declaratory judgment action must be decided before the agency adjudication can proceed.

Allowing FERC to depart from historical practice by withdrawing from federal courts the adjudication of claims under NGA § 4A—claims derived directly from common-law fraud principles that traditionally would have been tried to a jury—would unlawfully deprive petitioners of their Seventh Amendment right to a jury trial and their right to an Article III tribunal. Because "civil penalt[ies] w[ere] a type of remedy at common law that could only be enforced in courts of law," "the Seventh Amendment require[s] a jury trial" in any action that seeks such penalties.

Tull v. United States, 481 U.S. 412, 420, 422-23 (1987). Similar issues are presented in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, No. 16-712 (argued Nov. 27, 2017), which addresses the Article III and Seventh Amendment limits on agency adjudication of claims that historically would have been tried to a jury in a court of law.

This Court should accordingly grant the petition to ensure that the federal courts have a meaningful opportunity to apply the Solicitor General's position in *Lucia* and this Court's ruling in *Oil States* to FERC adjudication under the NGA. At a minimum, this Court should hold this petition until the Court resolves the important constitutional issues presented in *Lucia*, *Bandimere*, and *Oil States*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MIGUEL A. ESTRADA
Counsel of Record
WILLIAM S. SCHERMAN
LUCAS C. TOWNSEND
MATTHEW S. ROZEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioners

January 5, 2018