No. 22-616

In the Supreme Court of the United States

TURLOCK IRRIGATION DISTRICT, *et al.*,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF

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As the Petition explained, FERC's orders below adopt a categorical rule that when a State issues a *pro forma* document labeled a "denial," it "act[s]" on a water quality certification request for purposes of Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a). Under FERC's orders, Section 401's one-year rule is now meaningless for all federal hydropower and interstate natural gas projects. Any State can now issue *pro forma* denials every 364 days, for as many years as it wants, while requiring resubmittal of the same requests, thereby upsetting the cooperative federalism regime underlying the Clean Water Act, while delaying—or blocking altogether—critical energy projects across the Nation.

Respondents respond through misdirection. FERC attempts to run away from the reasoning in its own orders, remarkably claiming, contrary to its concessions before the D.C. Circuit, that its orders did not adopt a categorical rule blessing every-364-day-*pro-forma* denials. Respondents then try to change the subject by focusing at length on certain factual disputes about who was at fault for the delay on the certifications here. But as Petitioners pointed out, these disputes are irrelevant under *SEC v. Chenery Corporation*, 318 U.S. 80 (1943), and Respondents simply ignore that basic point of administrative law. In any event, Respondents' attempt to cast blame on Petitioners backfires, as it shows that it was California that set up a California Environmental

Quality Act ("CEQA") process that takes far longer than the one-year *federal* limit to complete for complicated projects like those here, thus purporting to override the federal one-year limit and turning the Supremacy Clause on its head.

This Court should grant the Petition.

I. FERC's Conclusion That Any *Pro Forma* Document Labeled A "Denial" Is An "Act" Under Section 401 Calls Out For This Court's Immediate Review

A. As the Petition explained, this Court's review is needed because FERC's orders here adopt a categorical rule that renders Section 401's one-year deadline a dead letter for all federal hydropower and interstate gas projects. FERC's orders concluded that if a State issues a document purporting to "deny" a certification request within one year, the State has "act[ed]" on that request under 33 U.S.C. § 1341(a), without further inquiry. Pet.App.55a, 58a–60a. Given FERC's nationwide jurisdiction, every State that wants more than a year to decide a Section 401 certification request can just deny the request in a *pro forma* letter every 364 days, for as many years as the State wants, rendering Section 401's deadline "inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (citation omitted). Whether FERC's categorical rule is legally correct is important to the hydropower and natural gas industries, as the leading organizations

explained. *See* Br. of Hydropower *Amici* in Support of Pet'rs, *Turlock Irrigation Dist. v. FERC* (U.S. Feb. 6, 2023) ("Hydropower Br."); Br. of Interstate Nat. Gas Assoc. of Am. & the Am. Petroleum Inst. as *Amici Curiae* in Support of Pet'rs, *Turlock Irrigation Dist. v. FERC* (U.S. Feb. 6, 2023) ("Natural Gas Br."). With more and more States relying on the *pro-forma*-denial scheme to delay Section 401 certification, Hydropower Br.19, the nationwide stakes are evident.

B. Having no credible argument to rebut the nationwide importance of the categorical rule that FERC adopted in its orders here, FERC attempts to redraft the Petition and FERC's own orders.

FERC falsely claims that the "question" Petitioners ask this Court to decide is whether "the State Board waived its water-quality certification authority under Section 401 of the Clean Water Act." Br. in Opp. for FERC ("FERC Opp.Br.") at 11. That is not the Question Presented. Whether "the State Board waived its water-quality certification authority," FERC Opp.Br.11, is for FERC to decide on remand after vacatur of its orders. But FERC can only decide that issue lawfully after this Court rejects FERC's mistaken categorical rule that any *pro forma* document labeled a denial is an "act" under Section 401. Pet.App.60a.

FERC then attempts to redraft its orders to avoid this Court's review. FERC now claims that the orders never "held that a State may indefinitely delay

federal licensing proceedings by issuing serial pro forma denial letters requiring repeated resubmissions of the same request as a way to circumvent the one-year deadline." FERC Opp.Br.19. *But that is exactly what FERC's orders concluded.* FERC's orders state, in no uncertain terms, that a State "act[s]" on a request by labeling it "denied" within the one-year deadline. Pet.App.55a, 58a–60a. FERC's orders then explain that the Commission will not look beyond the State's issuance of a denial letter, but that, perhaps, "courts will find repeated denials without prejudice" violate Section 401. Pet.App.65a. FERC does not cite even a word in its own orders that would support its belated interpretation of those orders.

FERC's attempt to redraft its orders is also contrary to what it told the D.C. Circuit, where the agency candidly conceded that the orders permitted serial denials lasting up to 100 years because FERC had concluded that this is what Section 401 permits. Pet.14 (citing Oral Argument Audio at 29:45–31:15 (Apr. 11, 2021)). FERC's effort to raise a new, implausible reading of its orders for the first time in its Brief in Opposition is thus waived. *See Zivotofsky v. Kerry*, 576 U.S. 1, 9 (2015). And while other Respondents contend the 100-year-delay hypothetical is unrealistic, Br. in Opp. for Cal. State Water Res. Bd. ("Board Opp.Br.") at 14; Br. in Opp. for Tuolumne River Trust ("Trust Opp.Br.") at 23, the statutory question is not whether some States will use the *pro-forma*-denial-letter scheme to extend their review for 100 years, but whether they will use that scheme to

extend review beyond the statutory one-year limit. On that point, the data are unequivocal, as States already take—*on average*—longer than a year to complete the Section 401 review process, Staff of Fed. Energy Regulatory Comm'n, AD13-9-000, Report on the Pilot Two-Year Hydroelectric Licensing Process for Non-Powered Dams and Closed-Loop Pumped Storage Projects and Recommendations 41–42 (2017), with some States taking far longer, *see Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019), and FERC's orders here give States a blank check to evade the one-year limit for as long as they want.

So while FERC argues that its orders did not "render[ ] any language in Section 401 'inoperative or superfluous,'" FERC fails to explain what "real force" or "effect" Section 401 has left under its orders. FERC Opp.Br.16 (quoting Pet.22). FERC's orders hold that States can just issue a *pro forma* denial letter every 364 days, while telling applicants they must resubmit their same requests, with no federal limit.[1]

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[1] EPA's ongoing rulemaking regarding Section 401 that FERC invokes, FERC Opp.Br.20–21, is irrelevant, as EPA's proposed rule does not propose to take any position on whether a State's *pro forma* denial of a Section 401 request constitutes an "act," *see* 86 Fed. Reg. 29541, 29542 (June 2, 2021); 87 Fed. Reg. 35318, 35377–35381 (June 9, 2022) (notice of proposed rule).

C. The arguments that the Trust and the Board raise to downplay the nationwide importance of FERC's categorical orders are unpersuasive.

The Trust argues that *Hoopa Valley* "solved" the "problem" of state delay of the Section 401 certification process. Trust Opp.Br.26. But like the bilateral withdraw-and-resubmit scheme at issue in *Hoopa Valley*—which at least requires the State to enlist the requestor's participation—the unilateral *pro-forma*-denial scheme here provides States a blank check to evade Section 401's one-year rule, jeopardizing the development of vital hydropower and natural gas projects. *See* 913 F.3d at 1104–05.

The Board argues that States' delay of hydropower and natural gas projects by evading the one-year rule is not "emblematic of a systemic problem." Board Opp.Br.15–16. It is clear, however, from the *amicus* briefs filed in this case that the problem of state delay during the Section 401 process is widespread, Natural Gas Br.13–17, and certainly not limited to California, *see* Hydropower Br.17–21.

The Trust and the Board also argue that FERC's blessing of the denial-every-364-days scheme is no big deal because such a scheme could violate some States' laws. Board Opp.Br.13–14; *see* Trust Opp.Br.11. But that would be a *state-law limit*, and would mean—contrary to Section 401's clear terms—that there is no *federal* limit on how long a State may take to decide an applicant's Section 401 request. *See* Pet.25–26.

Finally, the Board suggests that obstacle preemption might apply to prevent States from extending their Section 401 review through serial denial letters, or that some future FERC order could address the problem. Board Opp.Br.14. But obstacle preemption is disfavored, *Chamber of Commerce v. Whiting*, 563 U.S. 582, 607 (2011), and FERC's reasoning in the orders below rules out any future determination that any *pro-forma*-denial scheme is unlawful, *see supra* pp.3–5.

D. The Board's and Trust's efforts to defend the merits of FERC's categorical rule only illustrate how extreme and statutorily indefensible FERC's approach is. Petitioners' arguments for invalidating FERC's orders here rest on the same textual rationale that the D.C. Circuit employed to invalidate bilateral schemes to evade Section 401's one-year rule in *Hoopa Valley*; namely, that a scheme to evade Section 401's deadline by delaying the State's decision on the same certification request is not an "act" under that statute and thus cannot restart the clock for a State's Section 401 review period. Pet.22–24; *Hoopa Valley*, 913 F.3d at 1104. What FERC has done here—with the D.C. Circuit's blessing—is hold that this textualist rationale applies inexplicably only to bilateral schemes, but not to unilateral *pro-forma*-denial schemes. Pet.App.60a (distinguishing *Hoopa Valley* as involving a "coordinated scheme to evade the waiver period"). That makes no statutory sense, as the text of Section 401 is directed only at the State, and necessarily contemplates that a State may

unilaterally waive its authority to issue a water quality certification. *See* 33 U.S.C. § 1341(a)(1).

Critically and entirely devastating to their merits arguments, neither the Trust nor the Board has an answer to Petitioners' core point, Pet.24–26, that FERC's reading violates the principle that a statute should not be interpreted to render it "inoperative or superfluous, void or insignificant," *Corley*, 556 U.S. at 314 (citation omitted). The Trust seems to accept this as a cost of its reading of Section 401, *see* Trust Opp.Br.23–24, while the Board attempts to recast this principle of statutory interpretation as a "policy argument[ ]," Board Opp.Br.12.

II. The Fact-Specific, State-Law-Based Arguments That Respondents Raise Are Irrelevant Under *Chenery* And, In Any Event, Only Further Confirm The Danger Of FERC's Categorical Approach

A. As Petitioners explained, the fact-specific, state-law-based disputes between the parties as to why it took the Board two-and-a-half years, far longer than the one-year limit, to "act" on Petitioners' requests, 33 U.S.C. § 1341(a), are not relevant under *Chenery*, because FERC did not rely upon a resolution of those disagreements in its orders. Pet.3, 26–28.

In open violation of *Chenery*, Respondents rely on these disputes over and again, FERC Opp.Br.19–21; Board Opp.Br.18–19; Trust Opp.Br.27–29, without so

much as citing *Chenery*. Respondents' failure to engage with Petitioners' *Chenery* argument constitutes waiver. *See Zivotofsky*, 576 U.S. at 9. FERC's orders concluded that a document that a State labels a "denial" of an applicant's water quality certification application is an "act" under Section 401, *see supra* pp.3–5, so, under *Chenery*, the only issue before the courts (including this Court) is whether that conclusion is legally correct, with all other issues for FERC to sort out on remand after vacatur.

B. Even were this Court to consider the fact-specific, state-law issues that Respondents rely upon to defend FERC's orders on grounds found nowhere in those orders, these issues and arguments only further support Petitioners. Pet.28–30.

The recent change in California law that Respondents repeatedly highlight, FERC Opp.Br.14–15, 19–20; Trust Opp.Br.10, 22–23; Board Opp.Br.5, 7, supports Petitioners' point about the dangers of FERC's categorical approach, which inverts the Supremacy Clause by permitting state law to override the federal one-year rule. California is the entity that is subject to Section 401's one-year rule. 33 U.S.C. § 1341(a). California is also the entity that enacted CEQA, a time-consuming process that often requires more than the federal one-year limit to complete, Pet.28 (citing Cal. Water Boards, *Revised [CEQA] Initial Study and Environmental Checklist* at 8–42 (Nov. 9, 2016)), and *certainly* requires *far* more than a year for projects as complex as those at issue here.

That is why Petitioners could not possibly have completed the CEQA process before the one-year maximum that *federal* law allows the State expired.[2] That is also why the CEQA issue that the Board briefly mentions in its *pro forma* denial letters, Pet.App.84a–85a, 95a–96a, was entirely the fault of California, and not of Petitioners, contrary to

[2] The Board's remarkable claim that "[h]ad petitioners conducted their CEQA analysis before submitting their certification requests to the Board, the Board could have completed its certification process within a year," Board Opp.Br.19, bears no relationship to reality, as the Board well knows. It would have been impossible for Petitioners to have complied with CEQA's immense, time-intensive requirements before the time when federal law required Petitioners to file their requests for Section 401 certification, given the size and complexity of the hydropower projects here. *See* 18 C.F.R. § 5.23(b). CEQA required Petitioners to prepare a detailed statement on "*all* significant effects on the environment of the proposed project." Cal. Pub. Res. Code § 21100 (emphasis added); *see San Joaquin Raptor Rescue Ctr. v. County of Merced*, 149 Cal. App. 4th 645, 655 (2007). And while Petitioners had conducted years of environmental study and prepared thousands of pages of environmental analyses regarding these facilities by the time they requested Section 401 certification from the Board, FERC had yet to meet its responsibilities under federal law necessary to identify "all significant effects," such as analyzing effects and identifying measures to protect listed species under Section 7 of the Endangered Species Act, 16 U.S.C. § 1536, and identifying effects and developing mitigation measures associated with historic properties under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108.

Respondents' claims, FERC Opp.Br.14; Board Opp.Br.17, 19; Trust Opp.Br.21–22.

California's new law undermines Respondents' position in another respect. Understandably concerned that its time-consuming CEQA regime would lead to waiver under Section 401, California amended its law to give the Board the power to comply with Section 401 by granting a certification request "before completion of" the multi-year CEQA process, if the Board concludes that "waiting until completion of that environmental review . . . poses a substantial risk of waiver of the state board's certification authority." Cal. Water Code § 13160(b)(2). FERC's orders here rendered that state statute irrelevant because now, in no circumstance will the Board's "waiting until completion of that environmental review" ever "pose[ ] a substantial risk of waiver of the state board's certification authority," *id.*, given that FERC has concluded that any State can deny the certification requests every 364 days, for as many years as it pleases, *see supra* pp.3–5. Put another way, it would now be unlawful for the Board to rely upon this statute to issue a Section 401 certification before the completion of the often multi-year CEQA process because, under the FERC orders here, a *pro forma* denial *eliminates* any "substantial risk of waiver of the state board's certification authority." Cal. Water Code § 13160(b)(2).

Next, Respondents' criticism of the substance of Petitioners' certification requests as somehow "incomplete" is unfounded. FERC Opp.Br.14–15; Board Opp.Br.19–20; Trust Opp.Br.22–23. The applications were complete because California needed no further information from Petitioners to conduct its water quality certification review under 33 U.S.C. § 1341(a), as evidenced by the fact that it never requested additional water quality information or studies to complete its certification, Pet.29–30. To this day, Respondents have not identified *any* environmental data that Petitioners failed to submit two-and-a-half years before the Board got around to issuing the certification here. *See* FERC Opp.Br.14–15; Board Opp.Br.19–20; Trust Opp.Br.22–23.[3]

FERC also incorrectly claims that Petitioners provide no reason as to why California would want to delay the Section 401 review process here by waiting more than one year. *See* FERC Opp.Br.15; *see also* Board Opp.Br.16. The reason is obvious: California wants the bureaucrats working for its arm, the Board, to have as much time as they feel they need to draft up extensive certification conditions, without having

[3] That is also why Respondents are wrong when they argue that the Second Circuit's decisions support their position. FERC Opp.Br.18; Trust Opp.Br.11–12. The Second Circuit only suggested that a State's denial of an incomplete application—*that is, one missing relevant water quality information*—would be permissible under Section 401. *N.Y. State Dep't of Env'tl Conservation v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018).

to bother with Section 401's one-year rule. The Board here used that extra time to craft onerous, lengthy certification conditions, without even suggesting that it ever needed a single piece of additional water quality information beyond what Petitioners provided two-and-a-half years before. *See* Pet.11.

Finally, that Petitioners are challenging those oppressive conditions in state court is not, as FERC suggests, FERC Opp.Br.20, a vehicle problem. The fight in State court is about the specific state-mandated conditions that, absent a finding of waiver by FERC, will attach to Petitioners' federal licenses. But if Petitioners prevail before this Court, and then before FERC on remand, there will be no state-mandated conditions, as the Board would have waived its Section 401 certification authority. FERC does not explain what aspect of the state-law dispute in state court between Petitioners and the Board could impact that question of federal law here.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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