No. 22-743

IN THE

Supreme Court of the United States

NEVADA IRRIGATION DISTRICT, YUBA COUNTY WATER AGENCY, MERCED IRRIGATION DISTRICT,
Petitioners,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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INTRODUCTION

The briefs in opposition ("BIOs") ask this Court to accept the Ninth Circuit's assertion that it did not "decide whether the coordination standard FERC advances is consistent with the text of Section 401," and that it merely held that FERC's decision—that the Water Board and Petitioners engaged in a coordinated withdraw-and-resubmit scheme to evade the one-year statutory deadline—was "not supported by substantial evidence." App. 22a. By that device, the Ninth Circuit eviscerated FERC's coordination standard and Congress's one-year deadline in Section 401, but sought to shield its statutory interpretation from this Court's review. The Ninth Circuit should not be permitted to say "these are not the droids you're looking for," when the droids are in plain view.[1]

Here, the Water Board followed its established practice of *telling* Petitioners to withdraw-and-resubmit their applications solely to serve the State's purpose—*i.e.*, to give the Water Board more time to complete the State's statutory environmental review process, circumventing Section 401's one-year deadline. The Ninth Circuit incorrectly assumed that States can lawfully enact requirements for water quality certifications that take more than a year to complete. The court's decision necessarily means that it has blessed the Water Board's legal regime, even though it results in years of delay in violation of Section 401. The court's contrary *ipse dixit* (concealed by its thin claim that FERC's decision was not supported by substantial evidence) should not carry the day.

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[1] Obi-Wan Kenobi, *Star Wars: A New Hope* (Lucasfilm Ltd. 1977).

The Ninth Circuit's sleight of hand is the foundation for the BIOs' principal arguments: Respondents claim that the Ninth Circuit did not resolve an important question of federal law in conflict with the D.C. Circuit's decision in *Hoopa Valley Tribe* v. *FERC*, 913 F.3d 1099 (D.C. Cir. 2019), and two Second Circuit decisions, on the incorrect presumption that the court did not interpret Section 401. Respondents also try to distinguish *Hoopa Valley*, on the ground that the former involves a formal agreement, while this case involved informal coordination. As reflected in numerous cases, see Pet. 11-12 nn.4 & 5, *FERC* itself concluded that *Hoopa Valley* necessarily means that State-applicant coordination of the withdrawal-and-resubmission of water quality certification requests violates Section 401. And although the Second Circuit decisions involved different kinds of circumvention of Section 401's deadline, their plain import is that California's withdraw-and-resubmit scheme contravenes the law.

Respondents also seek to defend the Ninth Circuit's decision by blaming Petitioners for the delays here. But as Respondents well know, California law made it impossible for applicants to complete the State's review process within a year and the Water Board failed to act on Petitioners' applications even *after* Petitioners provided all necessary information.

Respondents further attempt to avoid this Court's review by stating that California has now changed its law to allow the Water Board to decide certification requests *before* the State's process concludes. But this argument spotlights the nationwide problem here: States like California will continue to invent ways to avoid Section 401's explicit statutory deadline, rendering that law a dead letter, unless this Court steps in. The Supremacy Clause does not allow California

to continue to use serial legal maneuvers to circumvent federal law.

Finally, although the Government cites the ongoing EPA rulemaking (now 3 years old) as a reason to deny review, it is not. EPA's proposed rule clearly states that EPA will not take *any position* on the legality of withdrawals-and-resubmissions. See *Clean Water Act Section 401 Water Quality Certification Improvement Rule*, 87 Fed. Reg. 35,318, 35,341 (June 9, 2022).

The petition should be granted.

ARGUMENT

I. THE NINTH CIRCUIT DECIDED AN IMPORTANT ISSUE OF FEDERAL LAW, DEEPENING A CONFLICT AMONG THE CIRCUITS.

1. The Ninth Circuit claimed that it did not decide any legal question, that it accepted FERC's "coordination standard" as the appropriate interpretation of Section 401, and that it found only that FERC's findings of coordination here were not supported by substantial evidence. App. 22a & n.11. As this Court is aware, an agency decision is supported by substantial evidence if the agency has before it "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek* v. *Berryhill*, 139 S. Ct. 1148, 1154 (2019) (citation omitted). The Ninth Circuit's purported reliance on this highly deferential standard of review transparently sought to shield its rejection of FERC's interpretation of Section 401, a decision that conflicts with decisions of the D.C. and Second Circuits and FERC's interpretation of Section 401.

FERC's decisions cited substantial evidence of coordination in each case, see, *e.g.*, Pet. 13-15. And

these decisions are fully consistent with FERC's prior determinations, including in *Placer County Water Agency*, 167 FERC ¶ 61,056, *reh'g denied*, 169 FERC ¶ 61,046 (2019), where FERC found coordination *based on emails virtually identical to those at issue here*. See *id.* at n.6 (quoting emails requesting applicants to "please submit a request to withdraw and resubmit your application"). As the Petition observes (at 24 & n.7), the D.C. Circuit cited with approval FERC's interpretation of Section 401 in *Placer County*. The Ninth Circuit manufactured its substantial evidence rationale to prevent review of its rejection of FERC's interpretation of Section 401.

Respondents also seek to bolster the Ninth Circuit's decision by blaming petitioners for the Water Board's delays, claiming that Petitioners failed to conduct the environmental review required by state law, and withdrew their Section 401 certification requests to avoid the Board's denial of "the[ir] requests based on that failure." *E.g.*, Water Board BIO 13. As Respondents know, this claim is irrelevant and demonstrably wrong. It is irrelevant to whether the Ninth Circuit correctly interpreted Section 401. And it is wrong because it was California that enacted the California Environmental Quality Act ("CEQA"), creating a process that takes far longer than Section 401's one-year limit. Pet. 9-11; Cal. Pub. Res. Code § 21100; Cal. Water Bd., *Revised [CEQA] Initial Study and Environmental Checklist* 8-42 (Nov. 9, 2016).

The Water Board's further claim that "[n]othing prevented petitioners from preparing that [CEQA] report before submitting their certification requests to the Board," BIO 24, is deeply misleading. As Respondents (again) well know, FERC requires applicants to file requests for water quality certification within 60 days after FERC issues a "ready for envi-

ronmental analysis" notice, but FERC's preparation of an environmental impact statement ("EIS") takes longer than a year. Pet. 9-10. And *CEQA* specifically requires petitioners to "whenever possible, use the [EIS prepared for FERC under federal statutory requirements] as [the] environmental impact report" submitted in the CEQA process. Cal. Pub. Res. Code § 21083.7(a). Thus, applicants *cannot* complete their applications for certification within one year in California, as the Ninth Circuit expressly recognized. App. 8a.

Respondents' attempts to blame Petitioners for the delays—to create a perception that the Ninth Circuit's decision was correct—are baseless.[2] The Water Board developed its withdraw-and-refile regime—a regime that violates Section 401—to facilitate California's overlong review process.[3] And the Ninth Circuit permitted this gutting of Section 401 by approving a state-law regime that requires more than one year.

2. Despite Respondents' attempts to recast the law, there remains a sharp conflict among the circuits as

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[2] Notably, Respondents fail to identify any environmental data the Water Board lacked to make its decisions when the Board instructed petitioners to withdraw-and-refile. *See* Pet. 13 (FERC issued its final EIS in December 2015, yet Merced withdrew-and-refiled in 2016, 2017, and 2018); *id.* at 15 (FERC issued its final EIS in 2014, yet NID withdrew-and-refiled in 2015, 2016, 2017 and 2018).

[3] Respondents insinuate that the State has no reason to delay and that project applicants are not harmed by it. *E.g.*, Water Board BIO 25. Both are incorrect. The State delays to build a case to support the imposition of extensive conditions on certification and avoid state-court litigation about those conditions, if possible. Further, as the Petition explains (at 27-28), delays can be a death knell for the financing of new federally licensed projects.

to whether a State may take longer than a year to act on certification requests under Section 401. Respondents' main argument that no conflict exists depends crucially on the premise that the Ninth Circuit did not actually decide the statutory question. As explained above, that premise is wrong. The Ninth Circuit assumed the key conclusion: that States may impose legal requirements that evade Section 401's one-year deadline, including establishing a review process that *cannot* be completed in the one year. *Supra* at 4-5.

The D.C. Circuit has taken the opposite position, holding that "a full year is the absolute maximum" period of time within which a State must act under Section 401. *Hoopa Valley*, 913 F.3d at 1104. Enforcing this bright-line rule is critical, that court decided, because otherwise "the states usurp FERC's control over whether and when a federal license will issue." *Id.* In contrast, the Ninth Circuit's decision allows such usurpation. Further, as explained above, FERC *agrees* that *Hoopa Valley* means that withdrawal-and-resubmission schemes like the one here are unlawful, so holding in all cases before it since *Hoopa Valley* was decided. Finally, Respondents' efforts to distinguish *Hoopa Valley* because it involved an agreement fixate on a factual distinction that did not drive the statutory interpretation. See Pet. 22.

The Second Circuit's interpretation of Section 401 aligns with that of the D.C. Circuit. And, while it is true that the precise issue presented in those cases involved when a certification request is "received" by the State under Section 401, see *N.Y. Dep't of Env't Conservation* v. *FERC*, 991 F.3d 439, 445-46 (2d Cir. 2021) ("*NY Dep't II*"); *N.Y. Dep't Env't Conservation* v. *FERC*, 884 F.3d 450, 453 (2d Cir. 2018) ("*NY Dep't I*"), the Second Circuit's *reasoning* was clear: "Section

401's one-year deadline is mandatory . . . it does not merely 'spur' the agency to action, but it bars untimely action by depriving the agency of its authority after the prescribed time limit." *NY Dep't II*, 991 F.3d at 447. Congress drafted Section 401 with a strict rule because it sought to "limit[] a certifying state's discretion and eliminat[e] a potential source of regulatory abuse." *Id.* at 448. States are prohibited from fiddling with the date of receipt of an application *because* a State lacks discretion to depart from the one-year rule, at its own instigation or the applicant's. Indeed, a State is *stripped* of authority to act upon Section 401 applications after a year. *NY Dep't I*, 884 F.3d at 452.

Overall, Respondents attempt to dice the conflict among the circuits too finely, quibbling with whether the unusually explicit contractual agreement to delay in *Hoopa Valley* separates it from the informal arrangements in *NY Dep't I* and *II*, and by extension whether Section 401 is violated when the State has no role in the delay. *E.g.*, Water Board BIO 17-18. But the conflict is clear: does "one year" mean one year, or does it mean something else? The D.C. and Second Circuits follow the plain and obvious meaning of the text; the Fourth and Ninth do not. See Pet. 25-26 (addressing *N.C. Dep't of Env't Quality* v. *FERC*, 3 F.4th 655 (4th Cir. 2021)).

On this record, as set forth in the Petition and above, the State itself established a system that ensured that the Water Board would be unable to meet Section 401's deadline. Then the Water Board instructed applicants to solve that problem by withdrawing-and-resubmitting their applications annually. Petitioners complied to avoid incurring any potentially retaliatory conditions from the Board. *That* is the record on which the Ninth Circuit decided this

case. The Ninth Circuit has blessed the State's statutorily based violation of federal law, where the D.C. and Second Circuits would not have. There is, accordingly, a mature conflict on the only legal question that matters here.

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

The Ninth Circuit's decision renders Section 401's one-year deadline for States to act on water quality certification requests "inoperative or superfluous, void or insignificant." *Corley* v. *United States*, 556 U.S. 303, 314 (2009). If States are free to enact legal regimes through which they persuade or coerce applicants to act to give the State as much time as it wishes to decide on and impose conditions on certification, then Congress's choice of a one-year deadline is meaningless. That question is important to both hydropower and natural gas pipeline projects; those enterprises cannot obtain FERC licenses or relicensing unless and until the States act. See Br. Of Hydropower *Amici Curiae* In Support of Petitioners, *Nev. Irrigation Dist.* v. *Cal. State Water Bd.*, No. 22-743 at Part III; Br. Of Hydropower *Amici Curiae* In Support of Petitioners, *Turlock Irrigation Dist.* v. *FERC*, No. 22-616 (U.S. Feb. 6, 2023); Br. of Interstate Nat. Gas Ass'n of Am. & the Am. Petroleum Inst. as *Amici Curiae*, *Turlock*, *supra*. It obviously is also important to Congress, which enacted Section 401 so that States cannot "indefinitely delay[] a federal licensing proceeding by failing to issue a timely water quality certification." *Alcoa Power Generating Inc.* v. *FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

1. Ignoring the plain statutory text and Congress's intent, Pet. 29-33, Respondents argue that delays are not a real problem. But the text of the statute is clear, as is the real-world problem. On average,

States already take longer than a year to complete the Section 401 review process. FERC Staff, 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 (May 26, 2017).[4] Some States take much longer. *Hoopa Valley*, 913 F. 3d at 1104 (describing delays including four of more than a decade). *Amici* and other sources confirm that State delays are widespread and problematic. See also Hydropower *Amici* Br. Part III; Natural Gas Ass'n *Amici* Br., *Turlock*, at 10; Claudia Copeland, Cong. Rsch. Serv., *Clean Water Act Section 401: Background and Issues* 6 (July 2, 2015) ("the most common cause of delayed hydropower licensing proceedings is untimely receipt of state water quality certifications"); FERC, *Report on Hydroelectric Licensing Policies, Procedures, and Regulations; Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000*, at 5 (May 2001).[5]

In arguing that the Ninth Circuit's decision is unimportant and that the issue it resolves will not recur, Respondents restrict their discussion to the decision's implications for hydropower licensing and relicensing, ignoring that it applies equally to federal licensing of hundreds of miles of interstate gas natural gas pipeline construction and myriad pipeline

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[4] Available at https://ferc.gov/sites/default/files/2020-05/final-2-year-process.pdf.

[5] In its BIO (at 21), the Water Board argues, in essence, that as of right now it has acted on all water quality certification applications, and thus this Court should ignore its history of delay and resistance. The Court should not ignore the historic record, Congress's decision to act on it, and California's long list of efforts to circumvent the federal statutory deadline. Pet. 28 & n.12.

maintenance projects under the Natural Gas Act. See 15 U.S.C. § 717b(d); 33 U.S.C. § 1341(a)(1). Thus, the Ninth Circuit decision also gives States authority to indefinitely delay the federal permitting of *gas pipeline* projects with potentially "project-killing" consequences. See Natural Gas Ass'n *Amici* Br. In *Turlock*, at 10 ("delay in the permitting process can cause significant, project-killing delays and prevent upgrades to vital natural gas infrastructure and performance of critical and time-sensitive maintenance activities"). The recurring and important nature of the issue presented thus reaches both hydropower and natural gas pipeline projects, both crucial to our Nation's energy infrastructure.

2. Respondents next claim that a change in California law—allowing the Water Board to issue water quality certifications without regard to CEQA—is a reason to deny review. *E.g.*, U.S. BIO 6 n.1, 8, 22 (referring to Cal. Water Code § 13160(b)(2)). That is often a reasonable claim; but here, reliance on this change in the law is the last refuge of scoundrels. California's laws governing water quality certifications have persistently rendered Section 401 a dead letter, and this statutory change is more of the same. Whether by its withdraw-and-refile scheme, by repetitively denying applications without prejudice, *Turlock Irrigation Dist.* v. *FERC*, 36 F.4th 1179 (D.C. Cir. 2022), *cert denied,* No. 22-616, 2023 WL 2959380 (U.S. Apr. 17, 2023), or by claiming a right to reopen certifications to add conditions whenever it pleases, see Pet. 28, cf. *Santa Clara Valley Water Dist.* v. *S.F. Bay Reg'l Water Quality Control Bd.*, 59 Cal. App. 5th 199, 206-09 (Cal. Ct. App. 2020) (regional water board rescinded and superseded water quality certification within a year), California has for years insisted on controlling this process in a way that does violence to Section 401's one-year deadline. See also Pet.

28 n.12 (recounting California's persistent resistance to FERC control over hydroelectric projects in the State). No matter the State's reason or method, this evasion of Section 401 is impermissible and should be condemned by this Court.

3. The Government half-heartedly cites the EPA's ongoing rulemaking process as a reason to postpone review. U.S. BIO 22-23. But as the Government's recitation of the litigation surrounding EPA's current 2020 rule reveals, that process has been lengthy and the Government's attempts to revise the 2020 rule have been unavailing (as the courts see it). Most importantly, however, EPA itself states that its rule will take no position on the legality of the States' use of withdraw-and-resubmit to avoid the one-year deadline. See 87 Fed. Reg. at 35,341. Nothing in that proposed rule detracts from the critical need for this Court's guidance.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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