No. 17-975

In the Supreme Court of the United States

TOTAL GAS & POWER NORTH AMERICA, INCORPORATED, 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 FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners' challenge to an order of the Federal Energy Regulatory Commission that has not yet issued, and may never issue, is not ripe for judicial review.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 859 F.3d 325. The opinions of the district court (Pet. App. 32a-131a) are not published in the Federal Supplement but are available at 2016 WL 4800886 and 2016 WL 3855865.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2017. A petition for rehearing was denied on August 8, 2017 (Pet. App. 132a-134a). On October 30, 2017, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including December 6, 2017. On November 22, 2017, Justice Alito further extended the time to and including January 5, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Energy Regulatory Commission (FERC) is charged with administering, among other statutes, the Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, and the Federal Power Act (FPA), 16 U.S.C. 791a *et seq.* The NGA, at issue here, vests the Commission with jurisdiction over the interstate sale and transportation of natural gas. The NGA prohibits natural gas companies from charging unjust or unreasonable rates and prohibits any entity from manipulating the natural gas markets. See 15 U.S.C. 717(b), 717c, 717c-1.

Since Congress first enacted the NGA in 1938, it has conferred on FERC (or its predecessor, the Federal Power Commission (FPC))[1] the authority to "investigate any facts, conditions, practices, or matters * * * to determine whether any person has violated or is about to violate any provisions" of the NGA. Ch. 556, § 14(a), 52 Stat. 828. Under that authority, FERC (and before it, the FPC) has for many decades investigated potential violations of the NGA and, after administrative proceedings, ordered remedies such as disgorgement and refunds where it found violations. See, *e.g.*, *Coastal Oil & Gas Corp.* v. *FERC*, 782 F.2d 1249, 1251 (5th Cir. 1986); *In re Mississippi River Fuel Corp.*, 9 F.P.C. 198, 214 (1950). Such orders repeatedly have been upheld by the courts of appeals. See, *e.g.*, *Transcontinental Gas Pipe Line Corp.* v. *FERC*, 998 F.2d 1313, 1325 (5th Cir. 1993); *Gulf Oil Corp.* v. *FPC*, 563 F.2d 588, 605

[1] The relevant functions of the Federal Power Commission were transferred to FERC in 1977. See Department of Energy Organization Act, Pub. L. No. 95-91, § 402, 91 Stat. 583-584 (42 U.S.C. 7172(a)).

(3d Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *Panhandle E. Pipe Line Co.* v. *FPC*, 143 F.2d 488, 491 (8th Cir. 1944), aff'd, 324 U.S. 635 (1945).

Until 2005, however, the Commission could order only equitable remedies for violations of the NGA; it lacked authority to impose civil monetary penalties under that statute. See *Coastal Oil*, 782 F.2d at 1253. Congress amended the NGA to grant FERC that authority in the Energy Policy Act of 2005 (Energy Policy Act), Pub. L. No. 109-58, 119 Stat. 594. Enacted after the Enron scandal and the Western energy crisis, the Energy Policy Act was intended to significantly strengthen FERC's enforcement powers. See, *e.g.*, 151 Cong. Rec. 14,432 (2005). Among other things, the Act amended the NGA to prohibit market manipulation, Energy Policy Act § 315, 119 Stat. 691, and to empower FERC to impose civil monetary penalties for those and other NGA violations, *id.* § 314(b)(1), 119 Stat. 691.

Section 22 of the NGA now provides that "[a]ny person that violates [the NGA], or any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of [the NGA], shall be subject to a civil penalty of not more than $1,000,000 per day per violation for as long as the violation continues." 15 U.S.C. 717t-1(a). It further provides that such a penalty "shall be assessed by the Commission after notice and opportunity for public hearing." 15 U.S.C. 717t-1(b). And it directs the Commission to consider, in initially "determining the amount of a proposed penalty, * * * the nature and seriousness of the violation and the efforts to remedy the violation." 15 U.S.C. 717t-1(c).

b. Following the passage of the Energy Policy Act, the Commission adopted detailed procedures governing the investigation and adjudication of violations of the

new market manipulation rules. See *Revised Policy Statement on Enforcement*, 123 F.E.R.C. ¶ 61,156 (2008); see also Pet. App. 6a-9a (summarizing Commission enforcement process in fourteen steps).

In general, the process begins with FERC's enforcement staff conducting an investigation using "conventional discovery methods such as reviewing documents, conducting interviews and depositions," and then informing the subject of the investigation of possible violations. Pet. App. 6a. If the staff recommends that the Commission initiate enforcement proceedings, the subject of the investigation has an opportunity to submit a confidential response to the enforcement staff. *Ibid.*; 18 C.F.R. 1b.19. If enforcement staff continues to believe a violation has occurred, the Commission considers the recommendation to initiate an enforcement proceeding together with any response from the alleged violator, and determines whether to issue an order to show cause why it should not find a violation. Pet. App. 6a-7a.

If the Commission issues an order to show cause, the respondent must file an answer to the charges. If FERC "is unpersuaded by the alleged violator's answer," it may then choose to set the matter for hearing, either on paper or before a "presiding officer," who may be an administrative law judge (ALJ). Pet. App. 7a-8a; see *Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties*, 117 F.E.R.C. ¶ 61,317, at para. 7 (2006) (Penalties Process); 18 C.F.R. 385.102(e)(1). If the Commission chooses to conduct a hearing before a presiding officer, then after such a hearing, the presiding officer prepares an initial written decision and certifies it to the Commission. 18 C.F.R. 385.708(b)(1) and (3). Any participant "may file with the Commission exceptions to the initial decision." 18 C.F.R. 385.711(a)(1)(i).

Finally, the Commission will then review the initial decision and any exceptions, and issue its own final order. 18 C.F.R. 385.712, 385.713(a)(2)(i); 117 F.E.R.C. ¶ 61,317, at para. 7. In accordance with Section 22's direction that any penalty for violating the NGA "shall be assessed by the Commission," 15 U.S.C. 717t-1(b), the Commission's order may impose civil monetary penalties.

c. Section 19 of the NGA governs judicial review of Commission orders. See 15 U.S.C. 717r. Any party aggrieved by an order of the Commission must first seek rehearing before the Commission. See 15 U.S.C. 717r(a); 18 C.F.R. 385.713. After the application for rehearing is resolved, any person aggrieved by a final Commission order "may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located * * * or in the United States Court of Appeals for the District of Columbia." 15 U.S.C. 717r(b). The court of appeals will uphold the Commission's order if it is "based on reasoned decision making" and its factual findings are "supported by substantial evidence." *Texaco Inc.* v. *FERC*, 148 F.3d 1091, 1095 (D.C. Cir. 1998); see, *e.g.*, *Gulf Oil Corp.* v. *FERC*, 706 F.2d 444, 451-452 (3d Cir. 1983), cert. denied, 464 U.S. 1038 (1984); see also 15 U.S.C. 717r(b). As this Court explained in reviewing the nearly identical judicial review provision of the FPA, that process represents "the specific, complete, and exclusive mode for judicial review of the Commission's orders." *City of Tacoma* v. *Taxpayers*, 357 U.S. 334, 336 (1958).

2. Petitioner TOTAL Gas & Power North America, Inc. (Total), is a North American subsidiary of TOTAL S.A., one of the world's largest oil and gas companies.

Pet. App. 9a. Petitioners Aaron Hall and Therese Tran are two Total trading managers. *Ibid.*

After receiving a tip from a former Total employee, the Commission's enforcement staff for several years investigated allegations that Total manipulated the natural gas market. Pet. App. 9a-10a. In November 2015, the enforcement staff notified Total of the staff's intention to recommend that the Commission initiate enforcement proceedings. *Id.* at 10a.

In April 2016, the Commission issued an order to show cause, directing Total to respond to allegations that it manipulated the price of natural gas between June 2009 and June 2012. Pet. App. 11a. The order required Total to file an answer with the Commission; permitted the enforcement staff to reply; and further provided that if Total chose to contest the proposed penalty, the Commission could either assess a civil penalty or set a hearing before an ALJ. *Order to Show Cause and Notice of Proposed Penalty*, 155 F.E.R.C. ¶ 61,105, at paras. 6, A-D. The order explained that if the matter were set for an ALJ hearing, and if the ALJ thereafter issued an initial decision finding violations, the Commission would then consider the initial decision and any exceptions filed by the parties. *Id.* at para. 6. The order further explained that if the Commission, in turn, found a violation of the statute, it would issue an order and assess an appropriate penalty. *Ibid.* At that point, the order to show cause explained, Total could (after requesting rehearing) seek review of the Commission's final order directly in the appropriate court of appeals. *Ibid.*; see 15 U.S.C. 717r(b).

In July 2016, Total filed a 201-page answer raising numerous factual and legal arguments—including the challenges to the Commission's authority raised in the

petition for a writ of certiorari—and urged the Commission to summarily dismiss all claims without a hearing. Pet. App. 11a. The Commission has not yet acted on that answer (either by dismissing the claims or ordering the matter heard before an ALJ), nor taken any of the multiple remaining steps in its administrative process that must occur before issuance of a final order.[2]

3. a. Meanwhile, between receiving notice that the FERC enforcement staff intended to recommend administrative proceedings and the order to show cause, petitioners separately initiated this declaratory judgment action in the United States District Court for the Southern District of Texas. Pet. App. 10a. The amended complaint alleges that—notwithstanding the long history of the Commission's adjudicating NGA violations—petitioners were entitled under the NGA to have a district court, rather than the Commission, finally determine whether Total had violated the NGA. Petitioners also raised various constitutional objections to the Commission's prospective proceedings under the Appointments Clause, the Fifth Amendment's Due Process Clause, and the Seventh Amendment's guarantee of a jury trial. *Ibid.* They sought a declaratory judgment that the Commission "lacked the authority to adjudicate violations of the NGA" because that authority is vested exclusively in federal district courts. *Ibid.*

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[2] For much of 2017, FERC lacked a quorum of commissioners and therefore could not take further action on the order to show cause. FERC regained a quorum on August 10, 2017. See Devin Henry, *Energy Commission Swears In New Members, Regains Quorum*, The Hill, Aug. 10, 2017, http://thehill.com/policy/energy-environment/346048-ferc-swears-in-new-members-regains-quorum.

b. The district court granted the Commission's motion to dismiss on three independent grounds. Pet. App. 65a-131a.

First, the district court explained that none of Total's claims was ripe for judicial review. Pet. App. 83a-91a. As the court explained, the issues that petitioners sought to address "are largely anticipatory." *Id.* at 87a. Although petitioners objected to Commission proceedings that result in a binding order imposing penalties, such an order (and, indeed, much of that process) may never come. "An ALJ may never be appointed." *Id.* at 90a. The court also noted that the Commission may "elect[] a hearing on written submissions or no hearing at all," and, indeed, the Commission "may abandon the civil penalty process" altogether "at any of several remaining steps." *Id.* at 88a, 90a. And, even if it does not, the court continued, the Commission ultimately "might decline to issue an order of penalty assessment." *Id.* at 88a. At bottom, petitioners' "jurisdictional, constitutional, and APA claims are defenses to acts that FERC has not yet taken and depend on a factual record that has not yet been developed." *Id.* at 91a.

Second, the district court concluded that, even if petitioners' claims were ripe, the NGA provides a comprehensive scheme for reviewing such claims, consisting first of administrative adjudication followed by judicial review vested exclusively in the courts of appeals. Pet. App. 92a-123a; see generally *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994). After thoroughly examining the text, structure, and purposes of the NGA, the court determined that the Act "displays a 'fairly discernible' intent" on the part of Congress to make that scheme the "exclusive means of obtaining judicial review" of petitioners' claims. Pet. App. 93a (quoting *Thunder Basin*,

510 U.S. at 207); see *id.* at 99a-115a. It further concluded that channeling petitioners' claims through that scheme would not "foreclose all meaningful judicial review" and that petitioners' claims were neither "wholly collateral to [the NGA's] review provisions" nor "outside the agency's expertise," as would be necessary to permit the court to resolve them outside the NGA's scheme. *Id.* at 115a (quoting *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010)); see *id.* at 115a-123a.

The district court rejected petitioners' argument that Section 24 of the NGA authorized the district court to review petitioners' claims. Pet. App. 95a-99a. Section 24 provides that district courts "shall have exclusive jurisdiction of violations of [the NGA] or the rules, regulations, and orders thereunder." 15 U.S.C. 717u. The court observed that that provision has been in the NGA since 1938, that identical provisions are found in many other New Deal-era regulatory statutes, and that none of those provisions has ever been interpreted in the manner petitioners suggest. See Pet. App. 96a-98a & n.88. Contrary to petitioners' "far-reaching and unprecedented new meaning," the court determined that those provisions were intended to address the "allocation of authority between state and federal courts," not "the relationship between federal courts and the agency." *Id.* at 96a-98a.

Finally, the district court ruled that even if it had jurisdiction, it would exercise its broad discretion under the Declaratory Judgment Act to decline to hear petitioners' claims on judicial economy and various other grounds. Pet. App. 123a-130a. The court observed that petitioners "do not challenge the agency's authority to hold some form of hearing and to propose penalties if

warranted"; they challenged only the Commission's authority to order a final assessment of those penalties. *Id.* at 129a. The court found it possible, however, "that the dispute will be resolved before the Commission issues any final order." *Ibid.* And, in any event, "there is no dispute that [petitioners'] issues could be addressed by the court of appeals on review of a Commission final order pursuant to NGA § 19." *Ibid.* As a result, the court reasoned that, "[n]ot only would th[e] [c]ourt's involvement at this time not save the parties expense, it likely would involve duplicative proceedings that increase the financial burden on all concerned." *Ibid.*

c. The district court subsequently denied petitioners' request for reconsideration, reiterating each prior ground for dismissing the case, and denied petitioners' request to file a second amended complaint as futile. Pet. App. 32a-64a.

4. a. The court of appeals affirmed on ripeness grounds. Pet. App. 1a-31a. The ripeness doctrine's "basic rationale," the court noted, "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Id.* at 15a (citation omitted). And although declaratory judgment actions are "often brought before injury has occurred," they are nevertheless "subject to the ripeness requirement." *Ibid.* Whether that requirement is met "must be determined on a case-by-case basis," the court continued, but, "'[a]s a general rule,'" a declaratory judgment action is ripe "where 'a substantial controversy of sufficient immediacy and reality [exists] between parties having adverse legal interests.'" *Id.* at 16a (citation omitted; brackets in original).

The court of appeals concluded that no such controversy existed here. The court first summarized petitioners' argument as contending that, "although FERC is statutorily authorized to conduct the 14-step procedure [described above], it may not issue a final order adjudicating a NGA violation or imposing a civil monetary penalty." Pet. App. 16a. Rather, petitioners contended that "FERC is permitted through these procedures only to *recommend* a finding of a NGA violation and *propose* a penalty," and that "only a federal district court has the power to adjudicate a violation and impose a penalty." *Ibid.* In other words, "Total * * * objects not to the FERC's process but to the potential *outcome* of this process." *Ibid.*

The court of appeals explained, however, that that outcome may never come to pass. The court observed that, in order for the Commission to find a violation and impose a penalty:

> First, it must consider Total's answer. Second, if it is unpersuaded by the arguments in Total's answer, it must determine what type of proceeding is necessary to adjudicate the matter. Third, if it sets the matter for a hearing before the ALJ, FERC must review the ALJ's initial decision, together with any exceptions (and answers to exceptions) filed by the parties. It may also request additional briefing or oral argument. If (in FERC's judgment) only a paper hearing is required, FERC reviews the record. Fourth, FERC issues a final order regarding the violation and the penalty * * * . Only upon completion of this final step does FERC conclusively adjudicate a violation and impose a penalty.

Pet. App. 21a. The court noted that, "at any point during these steps," the Commission may terminate the

proceedings "without finding a violation" and without imposing a penalty. *Id.* at 22a. The court noted that a prior Fifth Circuit panel had determined that an identical challenge to FERC's adjudication of NGA violations was not ripe, despite the Commission's being further along in its administrative procedures in the earlier case. *Id.* at 21a-22a (citing *Energy Transfer Partners, L.P.* v. *FERC*, 567 F.3d 134 (5th Cir. 2009) (*ETP*)). The panel concluded that the same result should obtain here. *Id.* at 22a-23a.

The court of appeals rejected petitioners' contention that, if it is forced to await a final order of the Commission, it would suffer harm by "'incurr[ing] significant expense defending against' the order to show cause." Pet. App. 25a. (brackets in original). "This argument," the court reasoned, "is refuted by one simple fact: Total * * * concedes that FERC is authorized to conduct a proceeding regarding the alleged violation and penalty *prior* to any action being brought in the district court." *Ibid.* Even under petitioners' theory, the court continued, petitioners are not being "forced to undergo an[y] 'additional' proceeding nor [are they] being subjected to an '*ultra vires*' proceeding." *Id.* at 26a (emphasis added). The court reasoned that, "although it may be true that [petitioners] will put more effort into defending itself in the FERC proceeding if a possible outcome is a definitive finding of liability and binding imposition of a penalty," "'the expense and annoyance of litigation * * * is part of the social burden of living under government,' and thus cannot constitute sufficient hardship for ripeness." *Id.* at 27a (quoting *ETP*, 567 F.3d at 139).

Because the court of appeals resolved the appeal on ripeness grounds, it did not resolve petitioners' arguments regarding either of the district court's "alternative bases for denial." Pet. App. 14a n.5.

b. Judge Jolly concurred. Pet. App. 29a-31a. Judge Jolly explained that he would "not rely on [*ETP*] so much," because this case involves a declaratory judgment action, while the company in *ETP* had filed a petition for review directly in the court of appeals under Section 19 of the NGA. *Id.* at 30a. Nevertheless, Judge Jolly agreed that petitioners' claims are not ripe for review. "Even assuming that [petitioners] [are] correct in [their] argument that [they are] entitled to *de novo* review of [any] penalty assessment in district court, no penalty can be said to have been 'assessed' until the conclusion of all FERC proceedings." *Ibid.* Until then, he reasoned, petitioner "does not have standing because the FERC proceedings up to this point are not *ultra-vires.*" *Ibid.*; see also *id.* at 30a-31a ("Total cites no authority for the proposition that subjecting a party to an arguably inefficient though not *ultra-vires* proceeding may constitute an injury sufficient to give rise to an Article III case or controversy.").

c. The court of appeals denied petitioners' request for rehearing and rehearing en banc, with no member of the court requesting that the court be polled. Pet. App. 132a-133a.

ARGUMENT

Petitioners contend (Pet. 14-29) that the court of appeals erred in affirming the dismissal of their complaint on ripeness grounds because the Commission has not yet issued an order adverse to petitioners and may never do so. The court of appeals' determination that petitioners' claims are not ripe is correct. Its decision

does not conflict with any decision of this Court or any other court of appeals. In any event, this case would be a poor vehicle for addressing the question presented because there are two independent, alternative grounds for affirmance of the judgment below. Further review is not warranted.

1. a. The court of appeals correctly held that petitioners' claims are not ripe. Ripeness "is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *National Park Hospitality Ass'n* v. *Department of the Interior*, 538 U.S. 803, 807-808 (2003) (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148-149 (1967)). It is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993); see also *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010). In determining whether a claim is ripe for adjudication, the Court considers both "the fitness of the issues for judicial decision and the hardship to the parties." *Texas* v. *United States*, 523 U.S. 296, 300-301 (1998) (quoting *Abbott Labs.*, 387 U.S. at 149). "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* at 300 (citation and internal quotation marks omitted).

The court of appeals correctly determined that this case does not present a controversy ripe for judicial review concerning the Commission's authority to issue a

binding order imposing civil penalties for violations of the NGA. As the court of appeals emphasized, the Commission has made no finding concerning Total's compliance with the NGA nor assessed any penalty, and it may never do so. Pet. App. 21a. All the Commission has done so far is issue an order to show cause. Before it may find a violation or assess any penalty, the Commission must next consider petitioners' 201-page answer, and if it is unconvinced by petitioners' arguments, it must determine whether to set the matter for a hearing. *Ibid.* After any hearing, the Commission must review the initial decision of the ALJ and any exceptions to it, and only if it then concludes that a violation has been established will the Commission issue a final order adverse to petitioners, which may or may not assess a penalty. *Ibid.* The Commission "can terminate a proceeding at any point during these steps," *id.* at 22a, and it remains open to the Commission to conclude that no violation occurred at all. Petitioners' challenge to these contingent future events, which "may not occur as anticipated, or indeed may not occur at all," are not ripe for judicial review. *Texas*, 523 U.S. at 300 (citation omitted). And if the Commission ultimately does issue a final order assessing civil penalties, that order would be reviewable in a court of appeals under 15 U.S.C. 717r, not in the district court.

b. Petitioners' contrary arguments are unavailing. Petitioners contend (Pet. 17-25) that they should not be required to participate in administrative proceedings before having their challenge to the possibility of a future final Commission order assessing civil penalties resolved. They contend (Pet. 18) that the "hardship of having to defend in an adjudicative proceeding in which the parties disputed the scope of the adjudication" is

sufficient hardship to make the possibility of such a Commission order ripe for review now. As the court of appeals recognized, "[t]his argument is refuted by one simple fact: Total * * * concedes that FERC is authorized to conduct a proceeding regarding the alleged violation and penalty *prior* to any action being brought in the district court." Pet. App. 25a. Under either side's view of the law, then, petitioners "would have to undergo a proceeding conducted by FERC *prior* to any district court proceeding" concerning Total's potential violation of the NGA and resulting civil penalty. *Id.* at 26a; see *id.* at 30a (Jolly, J., concurring) ("In other words, even assuming that Total is correct on the merits of this case, it still does not have standing because the FERC proceedings up to this point are not *ultra-vires*.").

Petitioners argue (Pet. 20), however, that the NGA authorizes the Commission to conduct only an "abbreviated in-house 'public hearing' to refine its allegations," and that the increased expense and burden to petitioners of defending the present proceedings renders their challenge to the possibility of a future final order assessing civil penalties ripe. As an initial matter, this asserted limitation on FERC's authority to conduct a "public hearing" on potential NGA violations has no basis in the statute. The NGA expressly states that the Commission "may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated" the NGA, 15 U.S.C. 717m(a), and provides that a civil monetary penalty "shall be assessed by the Commission after notice and opportunity for public hearing," 15 U.S.C. 717t-1(b). Even if petitioners were correct that this investigation, hearing, and assessment

may culminate only in a *proposed* penalty, there is nothing in the NGA requiring only the sort of "abbreviated" proceeding that petitioners appear to envision. See Pet. App. 26a ("Total offers only speculation to the effect that, if its interpretation of the statute prevailed, FERC would significantly 'abbreviate[]' the proceedings.") (brackets in original). Indeed, in the district court, petitioners "concede[d] there is no legal basis for th[e district court] to require FERC to alter these intervening procedures *even if* FERC must eventually prosecute its case *de novo* in a district court." *Id.* at 88a.

In any event, even if FERC's administrative proceedings would be less expensive or burdensome under petitioners' view of the NGA, that would not affect the ripeness analysis. "[T]h[is] Court has not considered this kind of litigation cost saving sufficient by itself to justify review in a case that would otherwise be unripe." *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 734-735 (1998). To the contrary, the Court has repeatedly recognized that "the expense and annoyance of litigation is part of the social burden of living under government." *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 244 (1980) (citation omitted); see *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *Petroleum Exploration, Inc.* v. *Public Serv. Comm'n*, 304 U.S. 209, 222 (1938). Indeed, this case is in the same procedural posture as *FTC* v. *Standard Oil Co.*, *supra*, where the plaintiff challenged the initiation of enforcement proceedings but the Court held that judicial review was unavailable because there had been no "final agency action" under the APA, 5 U.S.C. 704. See 449 U.S. at 238-243. Petitioners' suit suffers from the same defect.

Petitioners are wrong to suggest that this analysis is inapplicable merely because they seek relief under the

Declaratory Judgment Act: "[T]he Declaratory Judgment Act does not 'extend' the 'jurisdiction' of the federal courts." *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 127 (2007). And multiple courts of appeals have applied these same principles in rejecting declaratory judgment actions seeking to declare ongoing agency proceedings unlawful. See, *e.g.*, *Jarkesy* v. *SEC*, 803 F.3d 9, 13, 25-28 (D.C. Cir. 2015); *Hill* v. *SEC*, 825 F.3d 1236, 1245-1246 (11th Cir. 2016); *Bennett* v. *U.S. SEC*, 844 F.3d 174, 184-185 (4th Cir. 2016).

Stolt-Nielsen is not to the contrary. In that case, this Court held, in a footnote, that a challenge to a partial arbitration award authorizing class arbitration was ripe for review prior to the conclusion of such class proceedings. 559 U.S. at 670 n.2. Considering "'the fitness of the issues for judicial decision'" and "'the hardship to the parties of withholding court consideration,'" the Court reasoned that requiring the petitioners to "submit to class determination proceedings before arbitrators who, if petitioners [we]re correct, ha[d] no authority to * * * resolve their disputes on that basis," would cause "sufficient hardship" to make their claims constitutionally ripe. *Id.* at 670-671 n.2 (citation omitted). Because the respondents failed to argue ripeness in the lower courts, the Court held that the prudential aspects of ripeness had been waived, and the Court "s[aw] no reason to disregard that waiver." *Id.* at 671 n.2

The requirement under the NGA, 15 U.S.C. 717r, and the Administrative Procedure Act, 5 U.S.C. 704, to exhaust administrative procedures and obtain a final decision of the agency before seeking judicial review is a far cry from being subjected to unauthorized class-wide arbitration proceedings. Moreover, as the Court recognized in *Stolt-Nielson*, the "changes brought about

by the shift from bilateral arbitration to class-action arbitration" concern much more than simply the "procedure" in which those claims will be presented. 559 U.S. at 686. They "fundamental[ly]" change the nature of the proceeding from "resolv[ing] a single dispute between the parties to a single agreement" to "resolv[ing] many disputes between hundreds or perhaps even thousands of parties." *Ibid.*; see *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011) ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration."). Petitioners have made no showing that any differences between the "abbreviated" proceedings they concede FERC may conduct and the proceedings FERC may conduct in this case would effect such a fundamental change. And unlike in *Stolt-Nielsen*, ripeness was "pressed in" and "considered by" both courts below. 559 U.S. at 670 n.2. Accordingly, both the constitutional and prudential aspects of ripeness apply and counsel against hearing petitioners' claims before the Commission issues a final order.

Nor is the court of appeals' decision inconsistent with *MedImmune*. Cf. Pet. 25-29. Curiously, petitioners fault the court of appeals for not applying the ripeness standard as enunciated by this Court in *MedImmune*—namely, whether there is "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Pet. 25 (citation omitted). But the court of appeals *did* apply that standard, nearly word-for-word. See Pet. App. 16a (holding that, "as a general rule," a declaratory judgment action is ripe "where 'a substantial controversy of sufficient immediacy and reality [exists] between parties having adverse

legal interests'") (citation and brackets omitted). In any event, this Court has not distinguished between the articulation of the ripeness standard in *MedImmune* and in *Abbott Laboratories*, which itself concerned the ripeness of a suit brought under the Declaratory Judgment Act, but where there was final agency action. See *Abbott Labs.*, 387 U.S. at 139, 149-150, 153-154; see also *MedImmune*, 549 U.S. at 128 n.8 (relying on *Abbott Labs.*). And any daylight that might exist between the two articulations made no difference here. See Pet. App. 30a (Jolly, J., concurring) (concluding that, disregarding *Abbott Labs.*, petitioners' claims are not ripe under the *MedImmune* articulation).[3]

2. Petitioners also err when they contend (Pet. 14-17) that the court of appeals' decision conflicts with decisions of other courts of appeals. In fact, petitioners fail to cite any case in which a court of appeals has held ripe a suit to halt administrative proceedings before a federal agency based on the anticipated contents of an

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[3] Petitioners also quote in passing (Pet. 25) *MedImmune*'s statement 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 128-129. Here, of course, petitioners are not required to engage in primary conduct that may expose them to liability before challenging the constitutionality of a law. See *National Park Hospitality Ass'n*, 538 U.S. at 809-810; *Catholic Soc. Servs.*, 509 U.S. at 57-59. They are already in the midst of administrative proceedings regarding whether they committed market manipulation in the past, from June 2009 to June 2012, well before they initiated this suit. Under the court of appeals' decision, they must merely receive a final agency order in those proceedings before seeking judicial review of any adverse decision.

administrative order that has not yet issued, and may never issue at all.

In *International Brotherhood of Electrical Workers* v. *ICC*, 862 F.2d 330 (1988) (*IBEW*), the D.C. Circuit permitted a union that was "otherwise [a] prevailing party" to challenge a final agency decision affirming an arbitration award in its favor. *Id.* at 334. The court so held because the union was injured by the agency's interpretation of a statute that would, in all future cases, "impose[] another layer of review on arbitration awards." *Sea-Land Serv., Inc.* v. *Department of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998) (discussing *IBEW*). Unlike petitioners here, however, the union waited for the agency to conclude its review and actually issue its final order before filing its petition for review. See *IBEW*, 862 F.2d at 334 & n.8. That order satisfied administrative finality requirements and gave rise to a ripe dispute. The court explained that the petitioner was "no less injured by the * * * ruling than it would have been if the Commission had promulgated a rule in an informal rulemaking." *Id.* at 334. Indeed, the court observed that "one [wa]s hard-pressed to imagine" how the particular issue there "could arise in 'some more concrete and final form.'" *Id.* at 335 (citation omitted).[4]

The remaining cases cited by petitioners (Pet. 15-17) are even further afield. In *J.P. Morgan Chase Bank*,

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[4] Petitioners quote (Pet. 15) the D.C. Circuit's statement that the "cost of an additional proceeding is a cognizable Article III injury." *Sea-Land*, 137 F.3d at 648. *Sea-Land* in fact found the particular issue nonjusticiable, *id.* at 647-648, and in any event it arose on review of a final agency order, *id.* at 643-644. Moreover, petitioners here have not identified any "additional proceeding" at issue, as they have conceded that the Commission has authority to conduct an administrative proceeding to investigate violations and propose a penalty.

N.A. v. *McDonald*, 760 F.3d 646 (2014), the Seventh Circuit held that the plaintiffs had standing to bring an action to enforce a forum-selection clause because "[w]hen one party fails to honor its commitments, the other party to the contract suffers a legal injury sufficient to create standing even where that party seems not to have incurred monetary loss or other concrete harm." *Id.* at 651-652. The court said nothing about the ripeness of claims challenging agency proceedings prior to a final order or, indeed, about ripeness at all.

Farrell Lines Inc. v. *Ceres Terminals Inc.*, 161 F.3d 115 (2d Cir. 1998) (per curiam), similarly concerned a contracting party's attempt to enforce a forum-selection clause while the proceedings in the allegedly incorrect forum were pending—this time, in an Italian court. The entirety of the Second Circuit's jurisdictional analysis consisted of its statement that "the district court had jurisdiction over both the controversy and the Defendants" "[f]or substantially the same reasons as those stated by the district court." *Id.* at 116. The district court, in turn, had reasoned only that "in light of the pendency of the Italian action, this is an actual controversy that will be resolved by a declaratory judgment." *Farrell Lines Inc.* v. *Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118, 124 (S.D.N.Y. 1997), aff'd, 161 F.3d 115 (2d Cir. 1998). Unlike in this case, plaintiffs argued that the pending proceeding in Italy was entirely *ultra vires*, not only that the final order might be improper or the scope was too broad. See *ibid.* ("Plaintiff claims that * * * *any suit* concerning the Cargo must be brought in this district.") (emphasis added).

Finally, in *Enerplus Resources (USA) Corp.* v. *Wilkinson*, 865 F.3d 1094 (2017), the Eighth Circuit affirmed a preliminary injunction enjoining proceedings

pending in tribal court, allegedly in violation of another forum-selection clause. *Id.* at 1098. Neither the district court nor the court of appeals considered the ripeness of the plaintiff's claims. And, in any event, that case is distinguishable on the same grounds as other forum-selection cases, where the relevant injury is a breach of contract and the dispute is not over the scope of pending proceedings but whether they may occur at all. See *id.* at 1097 ("By this forum selection clause, Wilkinson agreed that any and all disputes arising under the Settlement Agreement would be litigated in federal district court—not tribal court.").

3. In any event, this case would be an unsuitable vehicle for resolving the question presented. In addition to ripeness, the district court dismissed petitioners' claims on two independent grounds. First, the district court concluded that under this Court's decision in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994), even if petitioners' claims were ripe for review, the district court would lack jurisdiction to resolve them outside the comprehensive review scheme established by the NGA. See Pet. App. 92a-123a. As this Court explained in construing the analogous direct-review provision of the FPA, "Congress * * * prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders." *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, 336 (1958). Under the exclusive mode in the NGA, judicial review is available only of a final order of the Commission, and only in a court of appeals. See 15 U.S.C. 717r. Because the court of appeals resolved the appeal on ripeness grounds, it did not reach this argument. See Pet. App. 14a n.5. But because it concerns jurisdiction, the issue would need to be resolved to grant petitioners any relief. See also *Smith* v.

Phillips, 455 U.S. 209, 215 n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted.").

In addition, the district court concluded that, "[e]ven if the controversy [were] justiciable and even if the [c]ourt ha[d] jurisdiction over [petitioners'] claims," it would decline to exercise its "wide discretion regarding whether to decide [petitioners'] declaratory judgment action." Pet. App. 123a; see *id.* at 123a-131a. Having decided that petitioners' claims were not justiciable, the court of appeals rightly did not review that conclusion. See *id.* at 14a n.5. But the district court's conclusion that it would not exercise its discretion to prematurely resolve petitioners' contentions provides yet another reason why this Court's intervention is unwarranted at this time. See *MedImmune*, 549 U.S. at 136 ("The Declaratory Judgment Act * * * has long been understood 'to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants.'") (quoting *Wilton* v. *Seven Falls Co.*, 515 U.S. 277, 286 (1995)).

4. Finally, there is no need to hold the petition until this Court resolves *Lucia* v. *SEC*, No. 17-130 (argued Apr. 23, 2018). See Pet. 33. Petitioners' Appointments Clause claim—like all of their other claims—is unripe. Neither court below addressed the merits of that claim. There is accordingly no possibility that the Court's resolution of *Lucia* will have any effect on the judgment below. If the Commission orders the pending administrative proceedings to be heard before an ALJ or any other presiding officer in a manner that might implicate the Appointments Clause, petitioners will have ample

opportunity to present their constitutional challenge in the manner prescribed by Congress—on review of the Commission's final order in the court of appeals.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] See *Tilton* v. *SEC*, 824 F.3d 276, 282-286 (2d Cir. 2016), cert. denied, 137 S. Ct. 2187 (2017); *Hill*, 825 F.3d at 1245-1250; *Bennett*, 844 F.3d at 184-186.