No. 17-975

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

REPLY BRIEF FOR PETITIONER

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

FERC is attempting to adjudicate claims against petitioners that Congress has said only a federal district court may adjudicate. If FERC succeeds, petitioners would be labeled wrongdoers by a federal agency and could incur more than $200 million in confiscatory penalties, subject (in FERC's view) only to deferential review by a court of appeals. This lawsuit seeks a declaration that Congress meant what it said in vesting federal district courts with "exclusive jurisdiction" to adjudicate FERC's claims, 15 U.S.C. § 717u, while limiting FERC's role to "determining the amount of a *proposed* penalty," *id.* § 717t-1(c) (emphasis added).

In materially indistinguishable circumstances, this Court and numerous federal courts of appeals have held that a federal court may declare its exclusive jurisdiction over a controversy that otherwise would proceed in an unauthorized forum. These decisions recognize that forcing a litigant into an *ultra vires* adjudicative process—regardless of the outcome of that process—is itself a cognizable injury giving rise to a ripe controversy.

FERC's primary response to these authorities is to assume its preferred outcome on the merits of this dispute. In FERC's view, there is no "controversy ripe for judicial review," Opp. 14, because petitioners can await FERC's final agency order and then ask a court of appeals to review that order for "reasoned decision making" and "substantial evidence," Opp. 5 (quotation marks omitted). But forcing petitioners to accept a binding final order that FERC has no authority to issue would substantially deprive them of the very relief they seek in this declaratory judgment

action. FERC has no more authority to adjudicate its claims against petitioners than the arbitrators in *Stolt-Nielsen SA v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010) had to decide whether an otherwise authorized arbitration could proceed as a class arbitration. Yet this Court recognized that the additional cost and burden of having to submit to an "ultra vires proceeding" was a cognizable "hardship" that satisfied both the constitutional and prudential prongs of ripeness doctrine. *Id.* at 671 n.2.

Unable to avoid *Stolt-Nielsen*, respondents mischaracterize petitioners' claim as seeking APA-style judicial review subject to the APA's statutory requirement that such review await "final agency action." 5 U.S.C. § 704. But even the decision below recognized that petitioners' declaratory judgment claims do not seek judicial *review* and are subject only to the ordinary ripeness requirement for declaratory relief: a "substantial controversy" with "sufficient immediacy and reality" to warrant relief. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (citation omitted). Respondents offer no sound reason to exclude the costs and burdens of adjudication from that analysis. Review is warranted to restore uniformity to this important area of law, and again make clear that the incremental burdens of litigation regarding the proper forum for adjudication give rise to a ripe controversy.

I. THE DECISION BELOW CREATES A CLEAR CIRCUIT SPLIT

The Fifth Circuit held categorically that "litigation expenses" "cannot constitute sufficient hardship for ripeness." Pet. App. 27a. That holding contradicts the decisions of at least four circuits recognizing that such expenses *can* make a controversy ripe. *See*

Int'l Bhd. of Elec. Workers v. ICC, 862 F.2d 330, 334-35 (D.C. Cir. 1988) ("*IBEW*"); *J.P. Morgan Chase Bank, N.A. v. McDonald*, 760 F.3d 646, 651 (7th Cir. 2014); *Farrell Lines Inc. v. Ceres Terminals Inc.*, 161 F.3d 115, 116 (2d Cir. 1998) (per curiam); *Enerplus Res. (USA) Corp. v. Wilkinson*, 865 F.3d 1094, 1097 (8th Cir. 2017). Each of these decisions found a cognizable injury from the costs of participating in proceedings that were either unauthorized or in the wrong forum. Each allowed litigants to go forward with their challenges to those proceedings without awaiting an adverse result in the challenged proceedings. Respondents' attempts to distinguish these decisions are unavailing.

Respondents claim that none of these decisions based ripeness "on the anticipated contents of an … order that has not yet issued." Opp. 20-21. But neither do petitioners. Petitioners' injury arises not from the future threat of an adverse ruling by FERC, but from the present burden of having to defend on the merits in an *ultra vires* proceeding—the same injury as in *IBEW*, *J.P. Morgan*, *Farrell Lines*, and *Enerplus*. Petitioners will have suffered that injury even if FERC ultimately declines to find liability or impose a penalty.

Respondents attempt to distinguish this case because the *ultra vires* proceeding petitioners seek to avoid is an "administrative proceedin[g] before a federal agency." Opp. 20. But *IBEW* dealt with an administrative proceeding too. The fact is, this supposed distinction is not legally significant. This is not an APA case subject to the APA's heightened ripeness standard for judicial review of "final agency action." 5 U.S.C. § 704. As even the Fifth Circuit recognized, petitioners are "not seeking review of a

FERC action." Pet. App. 23a. This is a declaratory judgment action arising under the district court's "exclusive jurisdiction of violations" of the Natural Gas Act ("NGA"). 15 U.S.C. § 717u. Thus, the APA's requirement of final agency action has nothing to do with this case. Nor did the Fifth Circuit purport to apply that requirement; instead, it held flatly—and much more broadly—that "litigation expenses" "cannot constitute sufficient hardship for ripeness." Pet. App. 27a.

It is therefore irrelevant that *IBEW* involved final agency action while this case does not. Opp. 21. And it is irrelevant that petitioners' other cases did not involve agency action at all. Outside of a judicial review claim subject to the APA's finality requirement, there is no basis to treat litigation expenses differently when they arise from administrative rather than judicial proceedings. As four circuits recognized, those costs are sufficient to make a controversy ripe.

Respondents' further attempts to distinguish petitioners' cases are makeweight. Respondents argue, for example, that *J.P. Morgan* and *Enerplus* did not expressly address ripeness. Opp. 22-23. But both decisions recognized that a litigant facing the burden and expense of defending in the wrong forum has a cognizable interest in *immediate* relief vindicating the proper forum. Indeed, to say that "litigation-related expenses" are an injury sufficient to create standing—as *J.P. Morgan* held, 760 F.3d at 651—is *necessarily* to say that this injury is ripe once it has occurred. Under the Fifth Circuit's approach, by contrast, the actions in *J.P. Morgan* and *Enerplus* could not have gone forward because neither plaintiff faced

any imminent injury other than the burdens of an *ultra vires* proceeding.

II. THIS CASE IS INDISTINGUISHABLE FROM *STOLT-NIELSEN* AND *MEDIMMUNE*

The Fifth Circuit's ruling also conflicts with *Stolt-Nielsen* and *MedImmune*. Under *Stolt-Nielsen*, the burden and expense of submitting to an "ultra vires proceeding" is "sufficient hardship" to create a ripe controversy. 559 U.S. at 671 n.2. Petitioners' injury is thus cognizable. And under *MedImmune*, a declaratory judgment claim—*especially* one that seeks to avoid "threatened action by the government"—is ripe as long it seeks to resolve "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." 549 U.S. at 127 (citation omitted). Petitioners' ongoing, cognizable injury easily meets that standard.

A. Respondents' principal response is to change the subject. Rather than address the ordinary ripeness standard for declaratory relief, they again argue that petitioners must satisfy an *additional* requirement that even the Fifth Circuit did not purport to apply—the APA's requirement of "final agency action." 5 U.S.C. § 704. According to respondents, the APA and the NGA's judicial review provision—Section 19(b), 15 U.S.C. § 717r(b)—require petitioners to "obtain a final decision of the agency before seeking judicial review." Opp. 18. In other words, respondents contend that the action is not ripe because they believe they are correct on the *merits* of the underlying controversy—that the agency may somehow adjudicate matters committed to the "exclusive jurisdiction" of federal district courts. Even the panel majority, however, conceded that Section

19(b)'s review provision—based on "final agency action"—does not remotely apply to this case. Pet. App. 24a & n.6. Because petitioners "see[k] a declaration of [their] right to have the action heard in federal district court"—not "review of a FERC action under Section 19(b)"—they need only show "an actual controversy with sufficient immediacy" to warrant declaratory relief. Pet. App. 23a-24a. The question is whether litigation expenses can create such a controversy, not whether there has been final FERC action.

Respondents nonetheless contend that petitioners must satisfy the APA's finality standard even in a declaratory judgment action. Opp. 17-18. They rely on this Court's statement that "the Declaratory Judgment Act does not extend the jurisdiction of the federal courts," which they misattribute to *MedImmune*. Opp. 18 (quotation marks and alterations omitted). The statement is actually from *Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S. Ct. 843, 848 (2014), which addressed subject-matter jurisdiction, not ripeness. The Court's point was that to award declaratory relief, a court must first have subject-matter jurisdiction over an underlying "coercive action" that could arise between the parties. *Id.* (quotation marks omitted). Here, the underlying coercive action is FERC's claim that petitioners violated the NGA, and respondents do not dispute that FERC *could have* brought that claim in federal district court under Section 24 of the NGA.

Because the district court's subject-matter jurisdiction was not based on the APA, the APA's ripeness standard—which is intended to avoid piecemeal *review* of agency action—has nothing to do with this case. Respondents' cases involving APA review of

final agency action—*Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998), and *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980)—are therefore inapposite. Opp. 17.[1] Both decisions applied the APA's heightened ripeness standard set forth in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), which governs "judicial review of final agency action," *id.* at 140. *See Ohio Forestry*, 523 U.S. at 733-34; *FTC*, 449 U.S. at 239. Because this action does not arise under the APA or any other statute governing review of final agency action, the *Abbott Laboratories* standard does not apply, and the Supreme Court's discussion of that standard in *Ohio Forestry* and *FTC* cannot help Respondents.[2]

Respondents reply that this Court applied the APA's finality requirement to a declaratory judgment in *Abbott Laboratories*. Opp. 19-20. But unlike the present action, the declaratory judgment claim in *Abbott Laboratories* was based on the APA: The plaintiff sued under the APA seeking "judicial re-

[1] The district court in *Ohio Forestry* recognized that the action there arose under the APA. *See Sierra Club v. Robertson*, 845 F. Supp. 485, 488 (S.D. Ohio 1994).

[2] Respondents also cite *City of Tacoma v. Taxpayers*, 357 U.S. 320 (1958), but that case merely rejected a collateral attack on a final agency order *already reviewed* by the Ninth Circuit. *Id.* at 338-39. *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974), and *Petroleum Exploration, Inc. v. Public Service Commission*, 304 U.S. 209, 222 (1938), are also inapposite. Both held that litigation expenses did not establish the type of "irreparable injury" needed to support *injunctive* relief against a federal agency. *Renegotiation Bd.*, 415 U.S. at 24; *Petroleum Exploration*, 304 U.S. at 221-22. Here, petitioners are seeking a judicial declaration of jurisdiction, not an injunction, and therefore need not show that their injury is irreparable.

view" of agency regulations and requesting "declaratory and injunctive relief." 387 U.S. at 139-40. There was no underlying coercive action between the parties like the claims that FERC could bring here under NGA § 24. This case is thus nothing like *Abbott Laboratories*; it is entirely divorced from the APA and that statute's requirement of final agency action.

B. Respondents' other attempts to distinguish *Stolt-Nielsen* also miss the mark.

Respondents argue that *Stolt-Nielsen* is distinct because it involved the costs of participating in class arbitration, which respondents contend is more burdensome than the administrative adjudication at issue here. Opp. 18-19. That misreads *Stolt-Nielsen*. The litigation costs found sufficient to create a ripe controversy were the costs of "submit[ting] to class *determination* proceedings"—not the costs of class arbitration itself. 559 U.S. at 671 n.2 (emphasis added). This Court found sufficient injury even though no class had yet been certified. *Id.* The present injury here is far greater than in *Stolt-Nielsen*: FERC is acting outside the NGA's grant of exclusive jurisdiction in district courts, in a proceeding that is both unlawful and unconstitutional, to adjudge petitioners wrongdoers and impose "confiscatory rather than compensatory fines." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring). The consequences for petitioners are far greater than a private arbitration award.

Respondents also claim *Stolt-Nielsen*'s analysis was limited to the *constitutional* requirement of ripeness and did not address "prudential" considerations that might "counsel against hearing petitioners' claims before the Commission issues a final order."

Opp. 19. But respondents' grounds for disputing ripeness are *statutory*—based on the APA and NGA § 19(b)—not prudential, and those grounds do not apply because petitioners do not seek judicial review under those statutes. As this Court recognized in *Lexmark International v. Static Control*, 134 S. Ct. 1377 (2014), so-called "prudential" limitations on justiciability must be grounded in statutory interpretation, since "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Id.* at 1386-87 & n.3 (citation omitted). Since no statute requires petitioners to await final agency action, there is no basis to import additional limitations on the types of injuries can that establish ripeness in this case.

C. Respondents' remaining merits arguments misconceive petitioners' injury. Respondents contend, for example, that petitioners' challenge rests on "contingent future events" because FERC has not "assessed any penalty" and "may never do so." Opp. 15. But petitioners' injury is not a future penalty order; it is the present burden of participating (regardless of outcome) in FERC's ongoing *ultra vires* proceeding. And respondents' argument would apply equally to *Stolt-Nielsen*: The plaintiff could have abandoned its case or the arbitrators could have declined to certify a class or ruled for the defendant on the merits. Yet the Court found the controversy ripe.

Respondents further contend that petitioners face no injury from having to defend in the present administrative proceeding because FERC has authority to conduct a *different* type of proceeding to investigate its allegations against petitioners and assess a "*proposed* penalty" before proceeding in district court. Opp. 16-17. But FERC undisputedly *has*

not commenced such a proceeding. Its guidance leaves no doubt that the agency proceeding already underway seeks conclusively to "determine whether a violation or violations occurred." Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties, 117 FERC ¶ 61,317 at P 7.3 (2006). Under FERC's view, the present proceeding will result in a binding determination of whether petitioners violated the NGA and must pay hundreds of millions of dollars in civil penalties, subject only to deferential review by a federal court of appeals. *Id.* PP 7.4, 7.6. FERC's adjudicative proceeding is thus different in kind than the purely investigatory proceeding that the NGA permits it to conduct. The additional litigation expenses from that unlawful proceeding are a cognizable injury even if petitioners might otherwise face some lesser litigation expenses should FERC choose to hold a purely investigatory hearing as a prelude to a district court action.

III. THERE ARE NO "INDEPENDENT" GROUNDS FOR AFFIRMANCE

Respondents fall back on illusory vehicle problems, arguing that "there are two independent, alternative grounds" for affirming the judgment below. Opp. 13-14. But neither of those so-called independent grounds would prevent this Court from deciding the question presented. And neither ground is "independent" because each is entirely bound up with the merits of petitioners' declaratory judgment claim, as petitioners told the Fifth Circuit. Pet. C.A. Br. 55-60.

The first "independent" ground is the district court's holding under *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), that the NGA requires "the claims [petitioners] assert to be evaluated

through the administrative process with judicial review in the court of appeals." Pet. App. 92a. But that holding rested expressly on the court's conclusion, on the merits, that Congress intended FERC—not the district courts—"to determine the existence of violations prior to assessment of civil penalties." *Id.* at 104a.

The second "independent" ground for affirmance is the district court's discretionary decision to decline jurisdiction under the Declaratory Judgment Act. Pet. App. 123a-130a. That decision, too, was based on the court's views of the merits. The district court believed that exercising jurisdiction would allow petitioners to "bypass[] the established processes for consideration of the claims asserted," based on its belief that the NGA assigns jurisdiction to FERC rather than to the federal district courts, and that petitioners were "forum shopping." *Id.* at 128a. But if petitioners are correct that Congress granted the district court "exclusive jurisdiction" over civil penalty litigation, 15 U.S.C. § 717u, it is FERC, not petitioners, that is "forum shopping" and "bypassing the established processes" for resolving this dispute by adjudicating these issues in its own, in-house tribunal. Pet. App. 128a.

If this Court grants the petition and reverses, the Fifth Circuit's review of the district court's two "independent" grounds for dismissal will compel it to decide the fundamental dispute between the parties about the proper division of responsibility between administrative tribunals and courts under the NGA. Thus, by rejecting the erroneous decision that this action is not ripe, this Court would ensure that the court of appeals decides the important and recurring

merits question that petitioners brought this action to resolve.[3]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[3] Alternatively, this Court should hold this petition and then remand in light of the disposition of *Lucia v. SEC*, No. 17-130 (argued Apr. 23, 2018). Respondents concede that the next step in the administrative process is to decide whether to assign the matter to an administrative law judge ("ALJ"). Opp. 4. And respondents do not dispute that the outcome in *Lucia* will determine the constitutionality of the appointment of FERC's ALJ. Therefore, *Lucia* should inform any future proceedings in this case.