No.

In the Supreme Court of the United States

EDISON ELECTRIC INSTITUTE; NORTHWESTERN CORPORATION D/B/A NORTHWESTERN ENERGY,
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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Public Utility Regulatory Policies Act of 1978 ("PURPA") created a class of electricity generators called "qualifying facilities" that receive highly favorable regulatory and commercial treatment, including a legal guarantee that electric utilities must purchase all the power they generate. Under PURPA, a "qualifying facility" must have "a power production capacity, which * * * is not greater than 80 megawatts." 16 U.S.C. § 796(17)(A). This case involves a proposed solar energy project that can *create* up to 160 megawatts of power, but that will *deliver* only 80 megawatts to the electric grid at any given time. Over Petitioners' protest, the Federal Energy Regulatory Commission certified this project as a "qualifying facility." The D.C. Circuit upheld the certification by deferring to the agency's statutory interpretation under *Chevron*. In dissent, Judge Walker sharply criticized the panel's opinion for embracing the same "*Chevron* maximalism" employed in the D.C. Circuit's prior decision in *Loper Bright Enterprises, Inc.* v. *Raimondo*, a case in which this Court has since granted certiorari.

The questions presented are:

1. Whether "power production capacity" refers to a facility's maximum net output to the grid at any one time, or whether that term instead refers to the maximum amount of power that a facility can create.

2. Whether this Court should reconsider how and when *Chevron* should apply, or at least clarify that courts must exhaust normal statutory-interpretation tools before concluding that a statute is "ambiguous" at *Chevron* step one.

PARTIES TO THE PROCEEDINGS

Petitioner Edison Electric Institute was a Petitioner in the court of appeals, and an intervenor in proceedings before FERC.

Petitioner NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern Energy") was a Petitioner at the court of appeals, and an intervenor in proceedings before FERC.

Respondent the Federal Energy Regulatory Commission was also a Respondent at the court of appeals.

Respondent Broadview Solar, LLC was a Respondent-Intervenor at the court of appeals, and was the applicant in the FERC proceedings.

Respondent NewSun Energy, LLC was a Respondent-Intervenor at the court of appeals, and was an intervenor in the FERC proceedings.

Respondent the Solar Energy Industries Association was a Petitioner in the court of appeals, and was an applicant for intervention in the FERC proceedings.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Supreme Court Rule 29.6, Petitioners provide the following disclosures:

1. The Edison Electric Institute is an incorporated, not-for-profit trade association representing all U.S. investor-owned electric companies. The Edison Electric Institute has no parent corporation and no publicly held company has 10% or greater ownership in the Edison Electric Institute.

2. NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern Energy") is a publicly traded company (Nasdaq: NWE) that is incorporated in Delaware. NorthWestern Energy has no parent corporations. Based on a June 12, 2023, review of the most recent statements filed with the Securities and Exchange Commission pursuant to Sections 13(d), 13(f), and 13(g) of the Securities Exchange Act of 1934, two publicly held companies own 10% or more of NorthWestern Energy's stock: BlackRock Inc. and Vanguard Group Inc.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- Order Denying Application for Certification and Revoking Status as a Qualifying Small Power Production Facility, *Broadview Solar, LLC*, 172 FERC ¶ 61,194 (Sept. 1, 2020);
- Notice of Denial of Rehearings by Operation of Law and Providing for Further Consideration, *Broadview Solar, LLC*, 173 FERC ¶ 62,056 (Nov. 2, 2020);
- Order Addressing Arguments Raised on Rehearing and Setting Aside Prior Order, *Broadview Solar, LLC*, 174 FERC ¶ 61,199 (Mar. 19, 2021);
- Notice of Denial of Rehearings by Operation of Law and Providing for Further Consideration, *Broadview Solar, LLC*, 175 FERC ¶ 62,100 (May 17, 2021);
- Order Addressing Arguments Raised on Rehearing, *Broadview Solar, LLC*, 175 FERC ¶ 61,228 (June 17, 2021); and
- *Solar Energy Industries Ass'n et al.* v. *FERC*, Nos. 21-1126 et al., 59 F.4th 1287 (D.C. Cir. Feb. 14, 2023).

TABLE OF CONTENTS

APPENDIX CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Statutes:

Regulations: **Page(s)**

Administrative Materials:

Other Authorities:

Other Authorities—Continued: **Page(s)**

Other Authorities—Continued: **Page(s)**

PETITION FOR A WRIT OF CERTIORARI

Edison Electric Institute ("EEI") and NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern Energy") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The D.C. Circuit's opinion is reported at 59 F.4th 1287 and is reproduced at Appendix A to the Petition. App., *infra*, 1a-28a. The relevant orders of the Federal Energy Regulatory Commission ("FERC" or "Commission") are reported at 175 FERC ¶ 61,228; 174 FERC ¶ 61,199; and 172 FERC ¶ 61,194, and they are reproduced at Appendices B, D, and F to the Petition, App. 29a-60a, 63a-124a, and 127a-154a, respectively.

JURISDICTION

The D.C. Circuit issued its opinion and judgment on February 14, 2023. No rehearing petitions were filed. On May 5, 2023, the Chief Justice extended the deadline for a certiorari petition to and including June 14, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutes and regulations are reproduced at Appendix G to the Petition, App. 155a-184a.

INTRODUCTION

The Public Utility Regulatory Policies Act of 1978 ("PURPA") affords an extraordinary set of non-market-based benefits to a class of electricity generating

facilities known as "qualifying facilities." Those benefits include, among other things, guaranteeing such facilities a market for whatever power they produce, by imposing a legal obligation on electric utilities to buy all of that power. A qualifying facility may not have a "power production capacity" that is "greater than 80 megawatts." 16 U.S.C. § 796(17)(A). This case involves the question of what the statutory term "power production capacity" means.

Respondent Broadview Solar, LLC ("Broadview") is developing a solar energy project in Montana. The facility's solar panels will be capable of creating up to 160 megawatts of power. But Broadview intends to artificially limit the facility's output, such that the project will deliver to the grid no more than 80 megawatts at any one time. It did so in an apparent effort to qualify for PURPA's special benefits, which include a guaranteed buyer for all the power it produces, and, in many cases, the ability to sell that power at above-market prices. When Broadview applied to FERC for an order confirming that its project is a "qualifying facility," the agency was presented with the question at the heart of this case: whether the statutory term "power production capacity" refers to a facility's output to the grid at one particular time, or instead to the amount of power the project can create.

As a matter of ordinary meaning, that is not a hard question. The word "production"—as defined by dictionaries, as understood in the electric industry, and as any ordinary speaker of English knows—refers to the *creation* or *generation* of something. The word "capacity," in turn, refers to the maximum amount of production. Thus, the unambiguous meaning of

"power production capacity" is the maximum amount of power that can be created. That reading follows not only from the plain text, but also from the statute's context, purpose, and history.

Because the Broadview Project will be capable of generating much more than 80 megawatts of power, it is ineligible for qualifying facility status. FERC's initial order recognized exactly that. But the agency then flip-flopped in a series of sharply divided rehearing orders following a change in composition of the Commission. Ultimately, a bare majority of Commissioners determined that the term "power production capacity" should be read to refer to the maximum amount of power that a project can *deliver* to the grid at any one point in time.

The D.C. Circuit upheld the agency's orders on the ground that FERC's reading of PURPA is entitled to *Chevron* deference. But the D.C. Circuit's application of *Chevron* was wrong from beginning to end.

At "step one" of the *Chevron* analysis, a court must "employ[] traditional tools of statutory construction" to determine whether a statute is ambiguous, and the court cannot advance to "step two" without first assuring itself that Congress had no "intention on the precise question at issue." *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). The D.C. Circuit's *Chevron* step one analysis, however, consisted of precisely three sentences, and it neither gave any consideration to the usual sources of ordinary meaning (*e.g.*, dictionaries), nor addressed statutory context, purpose, or history. The D.C. Circuit simply concluded that, because "PURPA does not define the[] term[]" "power production capacity"

explicitly, the statute is ambiguous and the court should skip straight to the deferential "step two" of *Chevron*. App. 6a.

That approach was wrong. As Judge Walker explained in dissent, the panel here made the same error that the D.C. Circuit has committed in a number of other recent cases—*i.e.*, "mak[ing] a beeline to agency deference" without first inquiring "into statutory structure, cross-references, context, precedents, dictionaries, or canons of construction." App. 19a (Walker, J., dissenting). Judge Walker viewed the opinion below as entrenching a "vertical split between how the Supreme Court and lower courts apply *Chevron*," and expressed concern that the D.C. Circuit has continued to follow the "path of *Chevron* maximalism" despite the fact that this Court appears to have "given up on *Chevron* * * * altogether." *Id.* at 19a, 21a & n.2 (internal quotation marks omitted).

The D.C. Circuit misapplied *Chevron* here, effectively and erroneously equating the lack of an express definition of particular terms with a "statutory silence" giving rise to ambiguity. Taken to its logical end, the court's stated rationale would, in effect, deem a statute ambiguous any time Congress has not provided an express definition of a particular term. That approach misperceives the *Chevron* inquiry by failing to recognize that statutory meaning can be clear even without bespoke, term-by-term definitions. In many cases (including this one), plain meaning can be discerned through the ordinary suite of textual interpretation tools. The panel's departure from that approach is reason enough to grant review, given the importance of the issue and the D.C. Circuit's central role in

reviewing federal agency action. But if *Chevron* is properly understood to condone the result reached here, then this case is further evidence that the time has come to reconsider *Chevron* by, at the very least, clarifying its limits.

This Petition should be granted or, at minimum, held pending disposition of *Loper Bright Enterprises, Inc.* v. *Raimondo* (No. 22-451), in which this Court has granted certiorari. In *Loper Bright*, this Court has granted certiorari to consider whether *Chevron* should be clarified or overruled outright. The questions presented in *Loper Bright* bear directly on the central issue in this case, and the panel decision here rests squarely on affording *Chevron* deference to the agency's interpretation. Judge Walker—who dissented both here and in *Loper Bright*—has noted that this case and *Loper Bright* are two particularly apt examples of the "*Chevron* maximalism" that is "alive and well" on the D.C. Circuit. App. 19a.

STATEMENT

1. Legal Background.

"PURPA was enacted in 1978 as part of a package of legislative proposals intended to reduce the country's dependence on oil and natural gas." Order No. 872, 172 FERC ¶ 61,041, P 47 (2020). PURPA accomplished that goal by "set[ting] forth a framework to encourage the development of alternative generation resources that do not rely on * * * fossil fuels." *Ibid.*

In the 1970s, most utilities were fully integrated providers of electricity generation, transmission, and distribution services. In PURPA, Congress determined that non-traditional electricity generators could

help reduce the nation's reliance on foreign fuel sources. See App. 2a. Congress also identified two potential impediments to the development of such facilities: "(1) traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development." *FERC* v. *Mississippi*, 456 U.S. 742, 750-751 (1982) (footnote omitted).

In an effort to remove those two impediments, PURPA created a new class of third-party generators that were not subject to the same requirements, regulations, and oversight as electric utilities. These "qualifying facilities" consist of small power producers and co-generators that would receive special rate- and regulatory-related treatment under the Federal Power Act and PURPA. See 16 U.S.C. § 796(17)-(18); 18 C.F.R. § 292.203.

The most important advantage granted to qualifying facilities was a dramatic, non-market-based innovation: Electric utilities would be *legally required* to purchase *all* of the electricity generated by qualifying facilities, at the utility's "incremental cost of alternative electric energy." 16 U.S.C. § 824a-3(d). This is commonly known as the "mandatory-purchase obligation." App. 3a.

Under PURPA, a "qualifying facility" must constitute a "small power production facility," defined to mean:

> a facility which is an eligible solar, wind, waste, or geothermal facility, or a facility which (i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and (ii) has a *power production capacity, which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts*.

16 U.S.C. § 796(17)(A) (emphasis added). FERC's regulations in turn state that:

> the power production capacity of a facility for which qualification is sought, together with the power production capacity of any other small power production facilities that use the same energy resource, are owned by the same person(s) or its affiliates, and are located at the same site, may not exceed 80 megawatts.

18 C.F.R. § 292.204(a).

2. Factual Background.

This case involves a solar energy project being developed by Broadview in Montana. See App. 3a. The Broadview Project will consist of two primary components: (1) an array of more than 470,000 solar panels which together have a gross capacity of 160 megawatts (the "solar array")[1]; and (2) a 50-megawatt battery

[1] The term "megawatt" refers to one million watts, and is approximately equal to the power output of ten car engines. See *What Is a Megawatt and a Megawatt-hour?*, CleanEnergyAuthority.com (May 4, 2010), https://perma.cc/DL2G-NG24. The term

energy storage system (the "battery") that Broadview intends to charge exclusively from the on-site solar array. See App. 3a, 17a; C.A. App. JA21-22, JA24, JA102.

Broadview purposefully designed the solar array and battery so that, when the sun is shining, it can divert a portion of the solar-generated power into the battery. Broadview can then deliver that stored power from the battery to the grid at night or when the sun is not shining, thus extending the facility's electricity delivery. See App. 8a, 17a, 52a-54a P 29.

The Broadview Project will also include twenty 4.127-megawatt inverters. App. 31a-32a P 4. An "inverter" is a system of circuitry that changes "direct current" or "DC" power (which is a one-directional flow of electric current) into "alternating current" or "AC" power (which is an electric current that changes direction periodically, and is the typical form of power delivered to U.S. homes and businesses). See App. 3a. The solar array generates DC power, and both the solar array and the battery will be located "upstream" of the DC-to-AC inverters. *Id.* at 56a-57a P 34. Broadview designed its project to include inverters that limit, to 80 megawatts, the amount of AC power that can be sent out from its project to the grid at any one point in time.

Broadview intends to interconnect with the electricity transmission system owned by Petitioner

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"megawatt-hour" refers to the amount of electricity generated by a one-megawatt generator in one hour. One megawatt-hour is equivalent to the amount of electricity used by roughly 330 homes in one hour. *Ibid.*

NorthWestern Energy and to sell the energy produced by the Broadview Project to NorthWestern Energy. See App. 3a. The Project has an expected commercial operation date of "Q4 2024." See *Montana Projects*, Broad Reach Power, https://perma.cc/CDA6-G7JJ (last accessed June 9, 2023).

3. FERC Certifies the Broadview Facility In a Sharply Divided Series of Orders.

In 2019, Broadview filed an application with the Commission seeking to have its Project certified as a qualifying facility. See App. 3a. NorthWestern Energy timely intervened in the FERC proceedings and objected to Broadview's application. See *id.* at 4a. EEI—a not-for-profit trade association representing all U.S. investor-owned electric companies—also timely intervened and objected. See *id.* at 3a-4a. EEI and NorthWestern Energy argued that the Project is not a qualifying facility because its "power production capacity" exceeds 80 megawatts.

In September 2020, FERC issued an order denying Broadview's application for qualifying facility status. App. 127a-154a. FERC concluded that a facility's "power production capacity" was *not* measured by its "send out," but rather the amount of energy the project could *create*. *Id.* at 142a-143a P 23. FERC found that "Broadview cannot meet the statutory [80-megawatt] limit by relying on inverters as a limiting element on a [qualifying facility's] output" and that it would "not comply with the plain language of PURPA" to confer qualifying facility status on "a facility purposefully designed with a 160 [megawatt] solar array." *Id.* at 141a-145a PP 21, 23, 25.

In March 2021, following appointment of two new Commissioners, FERC voted 3-2 to grant rehearing, set aside its initial order, and approve Broadview's application for qualifying facility status. App. 63a-124a ("Rehearing Order"). Contrary to the agency's prior view that the statutory text was clear, the Rehearing Order concluded that "the statute is ambiguous as to how the Commission is to measure a facility's power production capacity." *Id.* at 81a P 23. In the agency's new view, "the 80-[megawatt] limit on a facility's power production capacity" should be understood as "a limit on the facility's net output to the electric utility" at "any one point in time." *Id.* at 80a-84 PP 23, 26. Commissioner Danly dissented. He criticized the Rehearing Order for relying on "elaborately confected arguments and 'structural' interpretations of PURPA" that were contrary to "the unambiguous terms of the statute." *Id.* at 115a-116a P 24 (Danly, Comm'r, dissenting). Commissioner Christie also dissented. *Id.* at 101a.

In June 2021, the Commission denied rehearing of the March 2021 order, again by a 3-2 vote. App. 29a-60a (the "Second Rehearing Order," and, together with the Rehearing Order, the "Rehearing Orders").

4. The D.C. Circuit Defers to FERC's Interpretation of the Act.

A divided panel of the D.C. Circuit sustained FERC's Orders. App. 1a-14a. Judge Walker dissented in pertinent part. *Id.* at 15a-28a.

At step one of *Chevron*, the panel "agree[d]" with FERC that the statute is "ambiguous." In support of that conclusion, the Court explained that "PURPA

does not define" the phrase "power production capacity" or the related term "facility." App. 6a. On that basis, the court reasoned that the statute "does not state whether the relevant capacity is that of the individual subcomponent generating DC power, *i.e.*, the solar array, or of all the facility's components working together to produce grid-usable AC power, which would include the inverters." *Ibid.* As such, in the panel's view, "Congress has not spoken to the issue." *Ibid.*

Proceeding directly to step two of *Chevron*, the panel held that FERC's interpretation was entitled to deference. The panel credited FERC's view that the relevant form of "power" was the "grid-usable * * * AC power" that passed from the inverters to the grid. App. 7a. And because the facility can only deliver 80 megawatts of AC power to the grid at any one time, the panel found it "reasonable" for FERC to define "power production capacity" by reference to maximum AC power output. *Ibid.*

In dissent, Judge Walker criticized the majority for "mak[ing] a beeline to agency deference" instead of first conducting a meaningful "inquiry into statutory structure, cross-references, context, precedents, dictionaries, [and] canons of construction." App. 19a. He characterized the majority's approach as "*Chevron* maximalism." *Ibid.* (quoting *Buffington* v. *McDonough*, 143 S. Ct. 14, 21 (2022) (Gorsuch, J., dissenting from denial of certiorari)). In his view, the panel majority here made the same error as the D.C. Circuit had in *Loper Bright—i.e.*, concluding that "'some question' about the meaning of a statute is enough to trigger *Chevron* deference." *Ibid.* (quoting

Loper Bright Enters., Inc. v. *Raimondo*, 45 F.4th 359, 369 (D.C. Cir. 2022)).

Judge Walker explained that the meaning of "power production capacity" could "be resolved using normal interpretive tools." App. 21a. Based on the plain language of the statute, as informed by dictionary definitions and other indicia of ordinary meaning, Judge Walker concluded that the term "power" "includes both DC power and AC power," *id.* at 23a; that the term "produce" means to "create" or "generate," *id.* at 24a; and that the term "capacity" means "the maximum amount of power that the facility can produce," rather than what the facility can "deliver[]," *id.* at 25a. In Judge Walker's view, the Project is not a "qualifying facility," because its power production capacity exceeds 80 megawatts. *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

I. The D.C. Circuit's Split Decision Applying *Chevron* Deference Is Clearly Wrong.

A. The Term "Power Production Capacity" Unambiguously Refers to the Maximum Amount of Power that a Facility Can Create, Not "Net Output."

Chevron itself explained that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." 467 U.S. at 843 n.9. "In other words, courts must try every tool of statutory construction *before* declaring the text ambiguous and proceeding to agency deference." App. 20a (Walker, J., dissenting). Before advancing to *Chevron* step two, a court "must *exhaust*

all the 'traditional tools' of [statutory] construction," which include "text, structure, history, and purpose." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2415 (2019) (emphasis added). After all, "only when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is 'more [one] of policy than of law.'" *Ibid.* (quoting discussion of *Chevron* deference in *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)).

Had the D.C. Circuit followed this Court's guidance and carefully applied the standard suite of statutory-interpretation tools instead of "mak[ing] a beeline to agency deference," App. 19a (Walker, J., dissenting), it would have readily concluded that a facility's "power production capacity" is the maximum amount of power it can create, and not its maximum "send out." That reading is compelled by the ordinary meaning of the statutory text, as informed by statutory context and purposes.

1. The D.C. Circuit's Opinion Is at Odds with the Plain Meaning of the Statute.

The "ordinary meaning" of a statutory word or phrase can often be discerned by reference to common usage, context, statutory cross-references, and other indicia of meaning. Dictionaries are an important primary source in discerning meaning. See *Wisconsin Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2070-2071 (2018).

Dictionaries contemporaneous with the 1978 enactment of PURPA make clear that the term "production"

refers to the "*creation*" of something;[2] to "[t]hat which is * * * *made*";[3] or to that which is "*generate[d]*" or "*manufacture[d].*"[4] FERC's Rehearing Orders did not consider or even acknowledge dictionary definitions of "production."[5] Nor, remarkably, did the D.C. Circuit panel majority. The majority opinion did not cite or

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[2] *Collins Concise Dictionary of the English Language* 597 (1978) (emphasis added) ("production" means "the creation of economic value" and "produce" means "to create"); see *In re Amex-Protein Dev. Corp.*, 504 F.2d 1056, 1058 & n.1 (9th Cir. 1974) (per curiam) (discussing dictionaries that regard "create" and "produce" as synonyms); see also *infra* note 4.

[3] Production, *Black's Law Dictionary* 1089 (5th ed. 1979) (emphasis added); accord Production, *The Oxford English Dictionary* 566 (2d ed. 1989) ("production" means the "action of . . . making").

[4] *Webster's New Twentieth Century Dictionary of the English Language* 1436 (2d ed. 1978) (emphasis added) (defining "production" to mean "to produce" and defining "produce" to mean "to generate" or "to manufacture"); see Generation, *Collins Concise Dictionary of the English Language* 313 (1978) (defining "generation" to mean "production"); Produce, *Funk & Wagnall's New Comprehensive International Dictionary of the English Language* 1006 (1978) ("produce" means to "manufacture; make"); *id.* at 526 ("generation" means "[p]roduction" or "creation"); *Facebook, Inc.* v. *Duguid*, 141 S. Ct. 1163, 1171 (2021) (discussing dictionaries that regard the word "produce" as synonymous with "generat[e]").

[5] Instead, the agency reasoned that the terms "'production' and 'delivery' * * * are overlapping." App. 82a-83a P 25. But that is plainly wrong, as a matter of ordinary meaning. The term "delivery" refers to "the act of handing over." See Delivery, *Merriam-Webster New Collegiate Dictionary* 298 (1981). Equating "production" with "delivery" ignores the fact that "production" refers to the amount of a thing that was *created*, while "delivery" refers instead to the amount of a thing that is *transferred* after its creation, which can be some amount less than the whole amount that was created.

discuss even a single dictionary definition of this or other key statutory terms, despite extensive briefing on that topic and the dissenting opinion's discussion of dictionary definitions undermining the majority's analysis. This "strained effort to avoid the available dictionary evidence," *Noel Canning* v. *NLRB*, 705 F.3d 490, 509 (D.C. Cir. 2013) (internal quotation marks omitted), aff'd, 573 U.S. 513 (2014), in a rush to find ambiguity misperceives the *Chevron* inquiry.

Consider next the word "power." Dictionaries agree that "power" means "a source or means of supplying energy." App. 23a (Walker, J., dissenting) (quoting *Merriam Webster* (2023)); see App. 108a-109a P 13 (Danly, Comm'r, dissenting). AC power and DC power are forms of "power." See CADC Oral Arg. at 38:52 (Sept. 7, 2022) (counsel for FERC agreeing that "DC power is power"), https://perma.cc/Q7GE-K7LZ. But here FERC asserted, and the D.C. Circuit deferred to, an interpretation that "only the 80 megawatts of AC power sent to the grid should count as Broadview's power-production capacity." App. 23a-24a (Walker, J., dissenting). "That [interpretation] adds an atextual limit that Congress didn't adopt." *Id.* at 24a.

As to "capacity," dictionaries contemporaneous with PURPA's enactment suggest that this word refers to the "maximum amount that can be *contained*"[6] or to the "maximum or most efficient level of production"[7] or

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[6] Capacity, *The American Heritage School Dictionary* 135 (1977) (emphasis added).

[7] Capacity, *The American Heritage School Dictionary* 135 (1977).

"the ability to produce; equivalent to 'full capacity.'"[8] Here, FERC ignored dictionary definitions of "capacity" and instead stated without explanation or citation that "the term 'capacity' is generally equated to 'output.'" App. 82a-83a P 25. The D.C. Circuit deferred to that interpretation of "capacity" as "eminently reasonable," again without a meaningful analysis of ordinary meaning or citing even a single dictionary. App. 7a.[9]

To the extent the panel suggested that, under *Chevron*, FERC could reasonably treat the excess DC power from the solar array as not being "produced" until it is delivered to the grid in AC form, that reading cannot be reconciled with the ordinary meaning of the phrase "power production capacity." See *supra* notes 2-4 and accompanying text. An example makes the point. Suppose a factory can generate 160 widgets a day and is operated to achieve that level of production, but the

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[8] Capacity, *The Oxford English Dictionary* 857 (2d ed. 1989).

[9] As to "facility," all parties agree that this term refers to the aggregation of components at a generation plant. The D.C. Circuit reasoned that generators should not be excluded from qualifying facility status "because their component parts have individual production capacities over 80 [megawatts]," so long as "the overall facility cannot send out more than 80 [megawatts] to the grid." App. 8a. But that reasoning is irreconcilable with the statutory text: A limitation on the amount of power a facility can "send out" does not change how much power the facility can produce. The "limited ability of [the Broadview Project] to *convert* DC energy into AC for delivery is irrelevant to ascertaining the maximum *power production capacity* of the Facility" because the inverters' limitations on power conversion or output do not diminish the solar array's ability to *generate* substantially more than 80 megawatts of power. App. 115a P 23 (Danly, Comm'r, dissenting) (emphasis added).

owner places 50 of those 160 widgets into inventory instead of immediately selling them. No layperson would suggest that the factory's "production capacity" is anything other than 160 widgets per day or that the 50 widgets sitting on the factory's shelf have somehow not been "produced." So too here. The "power production capacity" of a 160-megawatt solar generator is not transformed into some lesser amount just because some of the generated power is stored temporarily before being delivered to the grid.

In sum, given the ordinary meaning of its constituent terms, the phrase "power production capacity" plainly refers to the maximum amount of power that can be created. There is no dispute that the Broadview Project can create 160 megawatts of power. Thus, its "power production capacity" is greater than 80 megawatts, and it is ineligible for qualifying-facility status.

2. Statutory Context Confirms Petitioners' Reading of PURPA.

Other portions of the statute confirm that the term "power production capacity" does not refer to a facility's "send out" but rather to the amount of power the facility can generate by "us[ing] * * * [an] energy source." 16 U.S.C. § 796(17)(A)(i) (defining "small power production facility" as one which "*produces* electric energy solely *by the use*" of a "primary energy source" such as a renewable resource (emphasis added)); *id.* § 796(17)(E) ("eligible solar, wind, waste, or geothermal facility" defined to mean facilities which "produce[] electric energy solely *by the use*" of certain "energy source[s]" (emphasis added)). In these provisions, Congress repeatedly defined the term "production" by reference to the phrase "use * * * of

[an] * * * energy source." This supports the notion that the word "production" refers to the amount of energy that can be *created* or *generated* by "using" or harvesting an "energy source" (here, the sun) regardless of what constraints may later be placed on output.

If Congress had meant to define "small power production facility" by reference to the facility's "*output* capacity" or "*delivery* capacity," it would have said so. See *Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 173 n.18 (1978). When Congress has intended to modify the term "capacity" in that manner, it has done so explicitly—as when it repeatedly used the phrase "transmission capacity" in the text of PURPA to refer to the ability of particular facilities to transmit or deliver power. See Pub. L. No. 95-617 §§ 202, 203, 92 Stat. 3117, 3135-3138 (1978). "[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (internal quotation marks omitted). The D.C. Circuit strayed from the proper interpretive inquiry by disregarding the difference between the phrase Congress chose ("power production capacity") and different phrases (*e.g.*, "transmission capacity" or other similar concepts) used in neighboring statutory provisions to refer to delivery or transmission, not generation.

3. Petitioners' Reading of PURPA Accords with the Statute's Purposes.

Congress's intent in enacting PURPA was to encourage only "*small* power production facilities," 16 U.S.C. § 796(17)(C) (emphasis added), and not "large power production facilities that masquerade as small

power production," Order No. 872-A, 173 FERC ¶ 61,158, P 245 (2020). By deferring to FERC's interpretation of PURPA, the D.C. Circuit's ruling will have the practical effect of requiring utilities to purchase energy from increasingly *larger* resources. Under the orders challenged in this case, any facility, regardless of size, can be a qualifying facility as long as it installs equipment to limit instantaneous output to 80 megawatts. And as this case clearly illustrates, highly sophisticated and well-resourced developers are designing projects in an attempt to obtain PURPA's market-distorting benefits for, and in practice to force utility customers effectively to subsidize, ever larger projects. See *infra* p. 32 and note 15. That seems a far cry from the "*small* * * * facilities" that PURPA sought to encourage.

This Court has recognized that another of Congress's purposes in enacting PURPA was to promote the development of renewables by encouraging competition among generators. *Mississippi*, 456 U.S. at 750-751. FERC's reading of "power production capacity," granted deference by the D.C. Circuit, does the opposite. The practical effect of that test is to expand the universe of facilities that enjoy guaranteed customers for their power, over the long run often at above-market prices. That will eliminate or reduce opportunities for non-PURPA renewables and other carbon-free generation—which must instead compete on the open market, without the tailwinds of above-market pricing and guaranteed purchasers.

Nor was PURPA "intended to require the rate payers of a utility to subsidize * * * small power producers." H.R. Rep. 95-1750, at 98 (Oct. 10, 1978)

(Conf. Rep.); see Order 872 P 14. But, as the Commission has recently recognized, in practice and as implemented by state public utility commissions, PURPA-compelled power purchase agreements have historically reflected significantly higher pricing than contracts negotiated on the open market. See Order 872 PP 253-254. The D.C. Circuit's decision will effectively penalize utilities and their customers by forcing them to purchase overpriced power from oversized qualifying facilities rather than from non-PURPA renewables.

B. The D.C. Circuit's Application of *Chevron* Was Wrong.

In this context, the D.C. Circuit's application of *Chevron* was flawed from beginning to end.

Consider first the panel's application of *Chevron* step one. Its analysis of statutory text consists of three sentences spanning less than one paragraph. App. 6a. The majority observed that "PURPA does not define the[] terms" "facility" or "power production capacity." From that premise, it jumped to the conclusion that "Congress has not spoken to the issue" and thus the Court should "move to step two" of *Chevron*. *Ibid.*

That approach fundamentally misperceives the *Chevron* inquiry. The mere fact that Congress has not included an express definition for a particular statutory term does not automatically render a statute ambiguous. "Even under *Chevron,* [courts] owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,'" the court finds itself "unable to discern Congress's meaning." *SAS Inst. Inc.* v. *Iancu*, 138

S. Ct. 1348, 1358 (2018) (quoting *Chevron*, 467 U.S. at 843 n.9). If a court applies the "traditional tools" of statutory construction at the outset of its analysis, it "will almost always reach a conclusion about the best interpretation" of the statute, thus resolving any ambiguity. *Kisor*, 139 S. Ct. at 2448 (Kavanaugh, J., concurring); accord Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2152 (2016). Here, the D.C. Circuit did not meaningfully employ the "traditional tools of statutory construction" at *Chevron* step one. The majority's analysis at step one cited no dictionaries or other evidence of ordinary meaning, and did not discuss the statute's structure, context, or purpose.

To be sure, the majority did *eventually* discuss the statute's text, purpose, and structure. But it did so only as part of its *Chevron* step two analysis. See App. 7a-8a. As a result, the majority stacked the deck in the agency's favor, essentially assuming without analysis that Congress actually left a "gap" for the agency to fill, and asking only whether the agency filled that purported gap in a reasonable way—without ever seriously considering the threshold question of whether any such gap in ordinary meaning exists in the first place.

Short-circuiting *Chevron* in this way—or, as Judge Walker put it, adopting this kind of "*Chevron* maximalism"—is deeply problematic. It diminishes the role of Article III courts under *Chevron* as properly construed, *i.e.*, to decide whether a statute conveys an unambiguous meaning, or instead is truly ambiguous. When step one is functionally ignored, as here, the court risks an "abdication of [its] judicial duty."

Gutierrez-Brizuela v. *Lynch*, 834 F.3d 1142, 1149-1158 (10th Cir. 2016) (Gorsuch, J., concurring); see also *Buffington*, 143 S. Ct. at 19-22 (Gorsuch, J., dissenting from denial of certiorari) (expressing this concern, and collecting opinions of other members of this Court criticizing *Chevron* maximalism).

To make matters worse, the majority's approach to statutory interpretation was deeply flawed, even viewed only as part of its *Chevron* step two analysis.

The D.C. Circuit began on the right foot, purporting to "start with the text." App. 7a. But in fact, the panel offered scant reasoning to explain how the text shows that FERC's interpretation was reasonable. The panel concluded that "the Commission's interpretations of 'power production capacity' * * * and of 'facility' * * * were eminently reasonable," without saying why. *Ibid.* On that point, the panel consulted no dictionaries, did not analyze the statute's structure, and said nothing about the statutory context suggesting that, when Congress wants to refer to a facility's "output capacity" or "delivery capacity," it does so explicitly. See *supra* p. 18.

At bottom, the D.C. Circuit held that FERC's interpretation of "power production capacity" was reasonable because the "only grid-usable 'power' that Broadview produces is AC power," such that "power production capacity" means the amount of AC power delivered for use on the grid. App. 7a. But PURPA sets an 80-megawatt ceiling for "*power* production capacity," not "*AC power* production capacity." And all agree that DC power is a form of power. See *supra* p. 15. The panel's decision to substitute its preferred term "AC power production capacity" for the actual

statutory term "power production capacity" disregards basic interpretive principles. See *Murphy* v. *Smith*, 138 S. Ct. 784, 788 (2018) ("[R]espect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own.").[10]

As another example of how its *Chevron* step two analysis shortchanged ordinary textual principles, the panel also failed to engage with the fact that, when Congress wants eligibility for regulatory benefits to be determined by reference to a facility's *AC* power production, it says so explicitly. For example, Congress recently expanded a tax credit for "qualified facilities," defined in that context as those "with a maximum net output of less than 1 megawatt (*as measured in alternating current*)." 26 U.S.C. § 48E(a)(2)(A)(ii) (emphasis added); see App. 24a (Walker, J., dissenting) (discussing this provision). The statute here, by contrast, refers to "power" generally, not limited to power "measured in alternating current." Cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[I]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion [of

[10] FERC's orders do not—and could not—fill the gaps in the panel's own reasoning. FERC did note in passing that "the appropriate measure of 'creation' * * * should be the creation of * * * AC electricity," but it made that argument only in one sentence of a footnote in the Second Rehearing Order. App. 41a P 17 n.61. FERC should not be permitted to "bury what it believes to be the heart of its order in the last line of a footnote," *McElroy Elecs. Corp.* v. *FCC*, 990 F.2d 1351, 1366 (D.C. Cir. 1993), only then to have the footnote become the centerpiece of judicial deference. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 519 (1989).

specific statutory language]." (internal quotation marks omitted)).

To the extent the panel's *Chevron* step two analysis considered the statutory purposes, it reasoned that "[e]xcluding facilities from qualifying facility status because their component parts have individual production capacities over 80 [megawatts]" would "be inconsistent with [PURPA's] goal" of "encourag[ing] the development of * * * small power production facilities." App. 8a (internal quotation marks omitted). But that simply begs the critical question of what Congress meant by "*small* power production" facilities. FERC's orders here, upheld by the D.C. Circuit, encourage increasingly *large* power production facilities by decoupling a facility's generation capabilities from its qualifying facility status.

Under the challenged agency orders, the developer of a massive project similar to California's 579-megawatt, 5-square-mile Solar Star Project could arrange to send only 80 megawatts of the power generated by the project through inverters to the public grid, use the rest of the power for other on-site or "behind-the-meter" purposes, and receive qualifying facility status. It strains credulity to suggest that such a facility (the largest industrial solar park in the United States) would constitute a "small power production facility" with a "power production capacity" of only 80 megawatts, so long as it is connected to 80-megawatt inverters. And it indisputably would not advance

PURPA's goals. But that is the necessary result of the D.C. Circuit's opinion.[11]

C. If *Chevron* Tolerates the Result Below, Then *Chevron*'s Application Should Be Reconsidered or Clarified.

As explained above, the D.C. Circuit clearly misapplied *Chevron* en route to upholding an agency interpretation that contravenes the plain language, structure, and intent of PURPA. But if the D.C. Circuit's decision is viewed as consistent with *Chevron*, then the time has come for this Court to reconsider how and when *Chevron* should be applied, and at a minimum to clarify its limits.

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[11] The D.C. Circuit's *Chevron* step two analysis also misunderstood relevant legislative history. PURPA's Conference Report, for instance, states that "[t]he power production capacity of the facility means the *rated capacity* of the facility." H.R. Rep. 95-1750, at 89 (emphasis added). "[R]ated capacity" is used in the electric industry to refer to the "nominal rating of generating equipment"—*i.e.*, to the amount of electricity that a generator can make when operating "under standard operating conditions," as distinct from the "actual output" of a facility after considering variations in operating conditions or other restrictions. *Occidental Geothermal, Inc.*, 17 FERC ¶ 61,231, at pp. 61,444-61,445 (1981). The D.C. Circuit read this Conference Report to equate "power production capacity" with the "rated capacity of the facility," not just the solar panels. App. 9a. But it nonetheless deferred to an agency interpretation that effectively gives talismanic significance to a single component of the facility (*i.e.*, the inverters). That the inverters can only send 80 megawatts of power to the grid at any one time does not change the reality that the Broadview Project can generate 160 megawatts of power.

Several current and former members of this Court have sharply criticized how *Chevron* is applied in lower courts today.[12] As Judge Walker recognized in dissent below, this "Court has not deferred to an agency under *Chevron* since 2016." App. 19a. To the extent this Court has addressed the issue in recent years, it has either "policed the limits of deference to agencies," *id.* at 19a-20a,[13] or declined to rely on *Chevron* even in cases implicating the doctrine.[14]

But the story in the lower courts—and especially in the D.C. Circuit—is quite different. As Judge Walker explained, "[t]hough the Supreme Court has given up on *Chevron* maximalism (and perhaps on *Chevron* altogether), lower courts have not." App. 21a n.2. "Between 2003 and 2013, lower courts applied *Chevron* in 74.8% of statutory interpretation cases involving agencies and reached step two 65.7% of the time." *Ibid.* (citing Kent H. Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 29, 33 (2017)). And in "2020 and 2021, circuit

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[12] See, *e.g.*, *Michigan* v. *EPA*, 576 U.S. 743, 760-64 (2015) (Thomas, J., concurring); *Gutierrez-Brizuela*, 834 F.3d at 1149-1158 (Gorsuch, J., concurring); Kavanaugh, *Fixing Statutory Interpretation*, at 2150-2154; see also *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2120-2121 (2018) (Kennedy, J., concurring); *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 108-112 (2015) (Scalia, J., concurring).

[13] See, *e.g.*, *West Virginia* v. *EPA*, 142 S. Ct. 2587 (2022).

[14] See, *e.g.*, *Becerra* v. *Empire Health Found.*, 142 S. Ct. 2354 (2022) (not mentioning *Chevron*); *Nat'l Fed'n of Indep. Bus.* v. *Dep't of Lab.*, 142 S. Ct. 661 (2022) (per curiam) (same); *BNSF Ry. Co.* v. *Loos*, 139 S. Ct. 893 (2019) (same).

courts applied *Chevron* 84.5% of the time and reached step two in 59.2% of those cases." *Ibid.*

The D.C. Circuit has acknowledged the "recent cases" in which this Court "has not applied the [*Chevron*] framework," but concluded that those cases "do[] not affect" *Chevron*'s applicability, because only this Court can overrule one of its own precedents. *Loper Bright*, 45 F.4th at 369. It therefore remains this Court's prerogative to "reconsider * * * the premises that underlie *Chevron*." *Pereira*, 138 S. Ct. at 2121 (Kennedy, J., concurring).

Whatever this Court's intentions when the case was originally decided, in practice *Chevron* has often been applied to "wrest[] from Courts the ultimate interpretative authority to 'say what the law is,'" in contravention of separation-of-powers principles and centuries of American legal tradition. *Michigan* v. *EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). And as applied in the lower courts today, *Chevron* has expanded the Executive Branch's authority, weakened the judiciary, and reduced Congress's incentive to exercise its lawmaking responsibilities, because agencies can "fill the gap" whenever bicameralism and presentment prove difficult.

This case presents an important opportunity for this Court to explain how *Chevron* should operate. Although this Court has intimated that courts should exhaust the normal statutory interpretation toolkit before deciding that a statute is "ambiguous," see *supra* pp. 12-13, 20-21, the lower courts generally do not apply *Chevron* in that way. That has generated what Judge Walker aptly characterized as a "vertical split

between how the Supreme Court and lower courts apply *Chevron*." App. 21a (Walker, J., dissenting). This Court can and should clarify (whether in *Loper Bright* or this case) that courts must exhaust the usual tools of statutory construction before reflexively deeming a statute ambiguous and resorting to *Chevron* step two.

Even if *Chevron* might make sense for a certain category of cases involving truly ambiguous statutes, this case does not fit that bill. In a telling footnote in its appellate brief, FERC conceded that interpreting the statutory language here "turns on legal principles of the sort that a court usually makes—i.e., principles of statutory interpretation—and not determinations specifically entrusted to an agency's expertise." FERC CADC Br. (Doc. 1934740), at 40 n.9 (Feb. 10, 2022). During oral argument, Judge Pillard aptly described that footnote as "surprising." CADC Oral Arg. at 42:25. As Judge Walker later explained in dissent, the footnote confirmed that PURPA "does not invite FERC to fill a policy gap." App. 21a. For its part, the majority opinion simply ignored the issue entirely.

At a minimum, this case presents a chance for this Court to clarify that lower courts should not grant *Chevron* deference when, as here, the agency itself has disclaimed the notion that interpretation of a particular statute is informed by agency expertise. See *PBGC* v. *LTV Corp.*, 496 U.S. 633, 651-652 (1990) (noting that "agency expertise is one of the principal justifications behind *Chevron* deference"); accord *Keyspan-Ravenswood, LLC* v. *FERC*, 474 F.3d 804, 812 (D.C. Cir. 2007) ("[W]e cannot defer when the agency simply has not exercised its expertise." (internal quotation marks omitted)).

The problems with the D.C. Circuit's application of *Chevron* here are exacerbated by the fact that this case implicates an extraordinary claim of regulatory power: the so-called "mandatory purchase obligation." See *supra* p. 6. That obligation effectively intervenes in power markets by forcing utilities to purchase all the power generated by a favored class of generators, over the long run often requiring them to pay above-market prices. And it does so even when the utility and its customers would rationally prefer not to do so—and indeed, even when a utility will be consigned to reselling that power into the open market at a loss. *Chevron* deference is at its most tenuous when, as here, it greenlights an agency decision that interferes with markets in an unusual and highly disruptive way, effectively allowing federal agencies to pick winners and losers without evidence that Congress intended that outcome. Cf. *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 666 (noting that "'lack of historical precedent' * * * is a 'telling indication' that [asserted power] * * * extends beyond the agency's legitimate reach" (quoting *Free Enter. Fund* v. *Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010))). And the D.C. Circuit deferred here to an agency interpretation offered in a third-in-time agency order, after FERC had flip-flopped on the question following a change in the Commission's composition. This case cries out for further review.

Whatever benefits *Chevron* may have had when decided decades ago, the doctrine's current implementation problems can no longer be ignored. This Court's intervention is warranted to rein in the *Chevron* maximalism that is alive and well in the lower courts.

D. At a Minimum, This Petition Should Be Held Pending Disposition of *Loper Bright*.

On May 1, 2023, this Court granted certiorari in *Loper Bright Enterprises, Inc.* v. *Raimondo* to address "[w]hether the Court should overrule *Chevron* or at least clarify [it]." No. 22-451, 2023 WL 3158352; see Pet. at i-ii, *Loper Bright* (No. 22-451) (Nov. 10, 2022) ("*Loper Bright* Pet."). The Petitioners in *Loper Bright* are advancing arguments that overlap considerably with Petitioners' position here, including that *Chevron* should be clarified to make clear that "courts are supposed to exhaust the statutory-construction toolkit before declaring an ambiguity that causes the tie to go to the agency." *Loper Bright* Pet. at 29-30. Indeed, the overlap between this case and *Loper Bright* is not subject to serious dispute. Judge Walker specifically identified this case and *Loper Bright* as emblematic of the "*Chevron* maximalism" that is "alive and well" in the D.C. Circuit, App. 19a (Walker, J., dissenting), and cited both cases as evidence of a "vertical split between how the Supreme Court and lower courts apply *Chevron*," *id.* at 21a & n.2.

As the United States has recently explained, a certiorari petition should be held when the "Court's resolution of the question presented in [a granted case] could conceivably affect the judgment of the court of appeals" in the case where the petition has been filed. Mem. for Resp. at 2, *Mangine* v. *Withers* (No. 22-738) (U.S. Apr. 10, 2023); see *Tucker* v. *Kemp*, 481 U.S. 1063, 107 S. Ct. 2209, 2209 (1987) (Brennan, J., dissenting) ("petition[s] should be held" when they present questions "similar" to those in a pending case).

That standard is easily met here. If this Court were to overrule *Chevron*, the judgment of the Court of Appeals could not stand, since it explicitly relied on the *Chevron* framework. The panel majority spent precisely one paragraph attempting to discern whether the statute had an ordinary meaning, and then framed the rest of its discussion around the limited question of whether "the Commission's interpretation was reasonable." App. 5a-10a. Even if this Court in *Loper Bright* merely provides clarification on when and how the *Chevron* framework should apply, a vacatur and remand would still be warranted, so that the D.C. Circuit can reconsider its decision in light of whatever guardrails *Loper Bright* might impose on *Chevron* deference. See *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam) (summary grant, vacate, and remand order appropriate when there is a "reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration" in light of intervening caselaw).

II. This Case Is an Ideal Vehicle to Address Exceptionally Important Issues.

1. The question presented here is exceptionally important to the energy industry and the country as a whole. Generally speaking, the integration of renewable energy resources into the electric grid is among the most important technological and infrastructure-related developments facing the United States today. That development is raising a host of legal and policy issues about the pace and manner in which this integration should occur, and who should bear the costs. This case will decide a critically important question in

this field: Whether electric utilities have a mandatory legal obligation under PURPA to purchase power from oversized solar facilities such as the Broadview Project, regardless of whether it would be optimal to do so from a customer, operational, or market standpoint.

Indeed, after FERC issued the Rehearing Orders challenged here, numerous other projects based on the Broadview model were announced (or were modified to adopt that model). FERC has dutifully certified those other projects as qualifying facilities, and challenges to those orders are being held in abeyance pending disposition of this Petition.[15] Absent this Court's intervention, the arrangement FERC endorsed in the Rehearing Orders—*i.e.*, building 160-megawatt (or larger) solar arrays with artificially restricted inverter banks that limit output at any given time, solely to reap the benefits of qualifying facility status under PURPA—appears set to become an industry-standard practice. And that trend will continue regardless of whether that model makes technical or financial sense without the artificial support FERC's interpretation of PURPA confers.

The proliferation of the Broadview model will have enormous impacts for Petitioner NorthWestern Energy and other electric utilities subject to the

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[15] See, *e.g.*, *Gallatin Power Partners LLC*, 176 FERC ¶ 61,120 (Trident Solar 1 project), reh'g denied, 177 FERC ¶ 62,048 (2021), petition for review filed *sub nom. NorthWestern Corp.* v. *FERC* (D.C. Cir. Dec. 21, 2021) (No. 21-1269); *Gallatin Power Partners LLC*, 177 FERC ¶ 61,181 (2021) (Shields Valley project), reh'g denied, 178 FERC ¶ 62,088 (2022), petition for review filed *sub nom. NorthWestern Corp.* v. *FERC* (D.C. Cir. Apr. 6, 2022) (No. 22-1055).

mandatory purchase obligation. In effect, the Rehearing Orders will dramatically expand the class of generators from which utilities will be required to purchase power under PURPA's mandatory purchase obligation, often at above-market rates. See *supra* pp. 19-20. Indeed, the lure of higher prices and a guaranteed customer for their power is presumably why developers are fighting so hard to expand qualifying-facility eligibility.

Given the enormous impact that the agency orders here will have on the dynamics of the U.S. power markets and ultimately the pocketbooks of utility customers, it comes as no surprise that the opinion below has attracted significant attention. One recent article characterized the questions in this case as having "dramatic, nationwide consequences."[16] And a former FERC Chairman described the D.C. Circuit opinion as a "big time" decision.[17]

2. That said, the importance of this case is by no means limited to the energy industry alone. Courts and regulated parties alike have a direct interest in knowing whether agencies can significantly disrupt market operations without undertaking a meaningful analysis of the statutory text at *Chevron* step one to determine whether such disruptions are actually what Congress intended. See Fischell & Walker, *supra* note 16, at 2 (noting that this case "exemplif[ies] the

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[16] Jennifer Fischell & Lucas Walker, Chevron *Still Has Power (For Now): The D.C. Circuit Defers to FERC in Recent Ruling*, at 1, Nat'l Law J. (Feb. 21, 2023), https://perma.cc/7WHQ-EBE4.

[17] Neil Chatterjee (@FERChatterjee), Twitter (Feb. 14, 2023 9:52 PM), https://perma.cc/B432-84CV.

ongoing judicial debate about *Chevron* deference" and that this Court "might look" at the D.C. Circuit's opinion here as a means of reaching "the question of *Chevron*'s continuing vitality," which this Court "has sidestepped" for years).

3. This case is an ideal vehicle to resolve the questions presented. FERC has struggled with the definition of "power production capacity" for decades, but prior cases involving that issue have fizzled before reaching this Court.[18] This case, by contrast, has no procedural defects: The D.C. Circuit clearly reached and resolved the lead question about PURPA's meaning. Moreover, the D.C. Circuit's decision rests squarely on affording deference to the agency under *Chevron*. See App. 6a.

That this case arises from the D.C. Circuit makes certiorari all the more appropriate. The D.C. Circuit has outsized importance for review of FERC orders under the Federal Power Act, 16 U.S.C. § 825*l*(b), as well as challenges to federal agency action more generally. And, as Judge Walker explained in dissent, "*Chevron* maximalism is alive and well" on that court. App. 19a. That is true even if *Chevron* may have "fallen into desuetude" in some other courts of appeals. *Buffington*, 143 S. Ct. at 22 (Gorsuch, J., dissenting from the

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[18] FERC's earliest decisions in this area—including *Occidental Geothermal, Inc.*, 17 FERC ¶ 61,231 (1981), and *Malacha Power Project, Inc.*, 41 FERC ¶ 61,350 (1987)—were never tested on judicial review. Those precedents are often applied by FERC, but have caused significant confusion among regulated parties and among FERC Commissioners themselves. Compare App. 42a-43a P 18, 49a-50a P 25, with App. 120a P 33, 144a-145a P 25 & n.62 (debating the meaning of these precedents).

denial of certiorari); see Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298, 1301-1302 (2018) (survey of federal appellate judges confirmed that "[m]ost of them are not fans of *Chevron*, with the significant exception of the judges we interviewed from the D.C. Circuit, the court that hears the most *Chevron* cases"); see also Kavanaugh, *Fixing Statutory Interpretation*, at 2153 (D.C. Circuit deals with *Chevron* "all the time" in cases that have "significant practical consequences"). Guidance on the continued vitality and scope of *Chevron* deference would restore a uniform approach in lower courts and have a major impact on a vast range of agencies, regulated parties, and other stakeholders.

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, the petition should be held for *Loper Bright Enterprises, Inc.* v. *Raimondo*, No. 22-451, and then disposed of accordingly in light of this Court's decision in that case.

Respectfully submitted.

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APPENDIX