No. 22-

IN THE

Supreme Court of the United States

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

Petitioners,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Federal Power Act, the Federal Energy Regulatory Commission ("FERC") has exclusive authority to issue licenses for the construction, operation and maintenance of hydroelectric projects on federal jurisdictional waters. 16 U.S.C. § 797(e). If a proposed license "may result in any discharge into the navigable waters" of the United States, the Clean Water Act requires the project applicant to provide FERC with "a certification from the State in which the discharge originates." 33 U.S.C. § 1341(a)(1). The Clean Water Act further provides that "[i]f the State . . . fails or refuses to act on a request for certification within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application." *Id.*

The Ninth Circuit found that in California, it is generally "not feasible for a Section 401 certification to issue within one year," and therefore "a practice has developed over the last several decades—in California and in other States—whereby project applicants withdraw their requests for certification before the end of the one-year review period and resubmit them as new requests" to give "the state more time to decide whether and under what conditions it will grant the certification request." App. 8a. The question presented is:

> Whether California "fail[ed] or refuse[d] to act" on petitioners' requests within one year as Section 401 requires by establishing the withdraw-and-refile practice to give the State "more time to decide" project applicants' certification requests.

PARTIES TO THE PROCEEDING

Petitioners here, respondent-intervenors below, are Nevada Irrigation District, Yuba County Water Agency and Merced Irrigation District. Petitioners in the Ninth Circuit were the California State Water Resources Control Board, South Yuba River Citizens League, California Sportfishing Protection Alliance, Friends of the River, Mother Lode Chapter of the Sierra Club, and Sierra Club and its Tehipite Chapter. The Federal Energy Regulatory Commission was the respondent in the Ninth Circuit.

RULE 29.6 STATEMENT

Petitioners are all public agencies formed under the law of the State of California. Thus, none has a parent corporation, and no publicly held corporation has ownership of them.

RELATED PROCEEDINGS

There are no cases directly related to these cases.

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PETITION FOR WRIT OF CERTIORARI

Nevada Irrigation District ("NID"), Yuba County Water Agency ("Yuba") and Merced Irrigation District ("Merced") (collectively "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's decision is reported at 43 F.4th 920 and is reproduced at App. 1a-30a. The underlying Federal Energy Regulatory Commission ("FERC" or "Commission") orders are reported at *Nevada Irrigation District*, 171 FERC ¶ 61,029, *on reh'g*, 172 FERC ¶ 61,082 (2020); *Yuba County Water Agency*, 171 FERC ¶ 61,139, *reh'g denied*, 172 FERC ¶ 61,080 (2020); and *Merced Irrigation District*, 171 FERC ¶ 61,240, *reh'g denied*, 172 FERC ¶ 62,098 (2020), and are reproduced at App. 31a-98a.

JURISDICTION

The Ninth Circuit entered judgment on August 4, 2022, App. 1a, and denied petitioners' timely petition for rehearing and rehearing *en banc* on October 7, 2022. App. 99a. On December 21, 2022, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including February 6, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1341(a)(1) of Title 33 of the U.S. Code provides in pertinent part:

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to,

> the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with the applicable provisions of section 1311, 1312, 1313, 1316, and 1317 of this title. . . . If the State . . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.

INTRODUCTION

This case involves the intersection of two important federal statutes: the Federal Power Act ("FPA") and the Clean Water Act ("CWA"). FERC issues federal licenses for the construction and operation of hydroelectric projects under the FPA, and the States issue water-quality certifications that are incorporated into those FERC licenses under Section 401 of the CWA. Critically however, Section 401 does not permit the States to "indefinitely delay[] a federal licensing proceeding by failing to issue a timely water quality certification." *Alcoa Power Generating Inc.* v. *FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011). Instead, if a State "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year)," the State has waived its Section 401 authority. 33 U.S.C. § 1341(a)(1). FERC determines whether a State has waived its power. *Alcoa Power*, 643 F.3d at 972.

This case involves FERC orders that determined that the State agency exercising California's water-quality certification authority, the California State

Water Resources Control Board ("State Water Board"), waived its right to issue water-quality certifications for relicensing three hydroelectric projects, because the Board had coordinated an impermissible scheme under which project applicants withdraw-and-refile their requests for certification which, in turn, allows the State to avoid Section 401's one-year deadline to act on a request.

The Ninth Circuit reversed FERC's waiver decision. It held that the State Water Board did not waive its Section 401 authority on this undisputed record, refusing to defer to FERC's assessment that the record demonstrated that the Board "fail[ed] or refuse[d] to act." Leaving aside the Ninth Circuit's refusal to defer to FERC's determination—a clear error of law, see *FERC* v. *Elec. Power Supply Ass'n*, 577 U.S. 260, 276 (2016)—the court's characterization of the record as legally insufficient to constitute a "fail[ure] or refus[al] to act" is wrong and cannot be squared with the statutory text or with decisions of the D.C. and Second Circuits.

The Ninth Circuit expressly recognized both that the State's required environmental review process generally cannot be completed within a year, and that, "over the last several decades," the State Water Board had accepted the withdraw-and-refile practice to give "the State more time to decide whether and under what conditions it will grant the certification request," App. 8a. Nonetheless, the court held the Board had not waived its authority to act on petitioners' water-quality certification requests under Section 401, App. 30a. The Ninth Circuit decision necessarily means that the State may establish a practice under which project applicants withdraw-and-refile requests for water-quality certifications year after year, or may enact a law that effectively requires the process to take more than

a year, without violating Section 401, in defiance of the statute and Congress's clear purpose.

In contrast, the D.C. and Second Circuits hold that Section 401 establishes a textually explicit, bright-line legal rule, and make clear that States cannot circumvent the plain text of the statute—by entering into a contract, enacting a law or regulation, and/or sponsoring a withdraw-and-refile process—to give themselves additional time to act. The Second and D.C. Circuits would have found that California waived its Section 401 authority under the undisputed circumstances here, where the State sponsored a legal regime to extend its time to act beyond the statutory deadline. This conflict is particularly disruptive because appeals from FERC licensing decisions can be brought in *either* the D.C. Circuit *or* the regional court of appeals where a hydroelectric project is located. 16 U.S.C. § 825*l*(b); 33 U.S.C. §1369(b)(1). Thus, this conflict will lead to forum shopping until this Court resolves it.

The underlying issue is important and recurring. Dozens of license applications and renewals are before FERC each year, and FERC cannot grant a license "until the certification required by [Section 401] has been obtained or has been waived." 33 U.S.C. § 1341(a)(1). Four courts of appeals have wrestled with the question of when a State "fails or refuses to act" under Section 401. And in enacting Section 401, Congress characterized the States' delay in acting on water-quality certifications as a significant concern for federal energy policy. Indeed, Section 401's purpose "is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification." *Alcoa Power*, 643 F.3d at 972.

The Ninth Circuit's decision is clearly wrong. Section 401 instructs that a State waives its certification authority if it "fail[s] or refuse[s] to act on a request for

certification within a reasonable period of time (which shall not exceed one year)." Based on this record, FERC found an established State practice of arranging repeated, annual withdrawals-and-refilings of identical or virtually identical requests for water-quality certifications to give the State more time to process such requests to accommodate the lengthy environmental analyses required by State law. The Ninth Circuit, however, validated the State's practice.

As noted, the Ninth Circuit itself recognized that California has set up a regime where it was generally "not feasible for a Section 401 certification to issue within one year," leading to the withdraw-and-refiling practice. App. 8a. This regime contravenes the text of Section 401 and Congress's purpose in enacting it. See *Hoopa Valley Tribe* v. *FERC*, 913 F.3d 1099, 1104-05 (D.C. Cir. 2019) ("*Hoopa Valley*") ("Congress intended Section 401 to curb a state's 'dalliance or unreasonable delay'") (quoting 115 Cong. Rec. 9264 (1969)). Indeed, FERC had repeatedly held that it will not halt its licensing process to provide States with more than a year to complete their internal processes for approving water-quality certifications. *Pac. Gas & Elec. Co.*, 170 FERC ¶ 61,232, at 31-32, 38, *on reh'g*, 172 FERC ¶ 61,065 (2020). The Ninth Circuit's contrary view of Section 401's requirements does violence to Section 401's text and purpose. See *EPA* v. *EME Homer City Generation, L.P.*, 572 U.S. 489, 508 (2014) (disapproving the court of appeals' creation of an "unwritten exception to [a] strict time prescription").

STATEMENT OF THE CASE

A. Statutory and Regulatory Background.

1. The Federal Power Act

The FPA provides FERC with exclusive authority to license the construction, operation, and maintenance of hydroelectric projects in the navigable waters of the United States. See 16 U.S.C. §§ 797(e), 808, 817. In the FPA (and its predecessor), Congress gave FERC licensing authority "to secure a comprehensive development of national resources." *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152, 180-81 (1946).

In issuing licenses, FERC is required to take into account numerous factors affecting the public interest, including water quality, and to attach appropriate conditions to protect the environment. See 16 U.S.C. §§ 797(e), 803(a)(1), 803(j).[1] If FERC does not grant a new license before expiration of an existing license, it may issue an annual license, allowing the project to operate year-to-year "under the terms and conditions of the existing license until . . . a new license is issued." *Id.* § 808(a)(1).

2. The Clean Water Act

FERC-licensed hydropower projects are also subject to Section 401 of the CWA, 33 U.S.C. § 1341. Section 401 requires an applicant for a federal license for an activity that may result in a discharge into navigable waters to request a water-quality certification from the State where the discharge will originate. *Id.* See also *S.D. Warren Co.* v. *Me. Bd. of Env't Prot.*, 547 U.S.

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[1] Hydropower projects are also subject to a number of federal environmental statutes, including the National Environmental Policy Act ("NEPA"), Fish and Wildlife Coordination Act, Endangered Species Act, Coastal Zone Management Act, and the Federal Land Policy and Management Act.

370, 373 (2006). FERC may not issue a federal license until the relevant State has either granted a water-quality certification or waived its right to do so. 33 U.S.C. § 1341(a).

Congress established the water-quality certification process to provide the States with the opportunity to review the proposed discharge and impose conditions to ensure compliance with State water-quality standards. Following certification, FERC may issue the license; it is statutorily required to include in the license any conditions the state imposes in its certification. See *PUD No. 1 of Jefferson Cnty.* v. *Wash. Dep't of Ecology*, 511 U.S. 700, 722 (1994).

Licensees also must apply to affected States for a new Section 401 certification each time a hydropower project is relicensed and for certain license amendments. See *S.D. Warren Co.*, 547 U.S. at 374-75.

While the States play an important role in maintaining water quality, their power is constrained: For all federal licensing actions triggering Section 401, the State has "a reasonable period of time (which shall not exceed one year) after receipt" of the certification request "to act" upon it. 33 U.S.C. § 1341(a)(1). Thus, States cannot "indefinitely delay[] a federal licensing proceeding by failing to issue a timely water quality certification." *Alcoa Power*, 643 F.3d at 972. If the State "fails or refuses to act" within a year, the State waives its Section 401 authority. 33 U.S.C. § 1341(a). See also 115 Cong. Rec. 9,264 (Apr. 16, 1969) (statement of Rep. Edmondson) (waiver provision was intended to "do away with dalliance or unreasonable delay and to require a 'yes' or 'no'" by states to a federally permitted project); *id.* (a state's delay "could kill a proposed project just as effectively as an outright determination on the merits not to issue the required certificate").

The question whether a State has waived its authority under Section 401 is decided by the federal permitting agency, here FERC. See *Hoopa Valley*, 913 F.3d at 1104-05. Where a State waives its authority, FERC nonetheless has tools to protect water quality, and it considers State water-quality conditions as recommendations, see *S. Feather Water & Power Agency*, 171 FERC ¶ 61,242, *reh'g denied*, 172 FERC ¶ 63,101 (2020).[2]

FERC has exercised its rulemaking authority to establish a licensing process that considers the States' issuance of Section 401 certifications. FERC's regulations establish an involved information-gathering process in connection with the filing of applications for new or renewed licenses. The States may participate in that process. See 18 C.F.R. §§ 5.6-5.15. The State Water Board actively participated in all three licensing proceedings at issue.

When that FERC process concludes, FERC issues a "ready for environmental analysis" notice. FERC's regulations explicitly require applicants to provide to FERC within 60 days a copy of a certification; a copy of a request for a certification; or evidence of the applicable State's waiver of certification. See 18 C.F.R. § 5.23(b)(1). Thus, under FERC's regulations, an applicant is not required to request Section 401 certification until FERC has determined the environmental record is essentially complete.

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[2] *See* 18 C.F.R §§ 5.15, 5.17-19. Under NEPA, FERC must issue a detailed environmental impact statement or an environmental assessment. *See* 16 U.S.C. § 797(e). *See also S.D. Warren Co.*, 547 U.S. at 373-74 (FERC makes licensing decisions "after a review that looks to environmental issues as well as the rising demand for power").

FERC promulgated these regulations in a 2003 rulemaking in which it *rejected* proposals to set the time for States to issue certifications later in the licensing process to account for individual States' internal processes. Specifically, FERC refused to accept California's request for accommodation of its environmental review process established by the California Environmental Quality Act ("CEQA"). See *Hydroelectric Licensing Under the Federal Power Act*, 68 Fed. Reg. 51,070, 51,096 (Aug. 25, 2003) ("We cannot accept an open-ended deadline date to be negotiated in each proceeding. That would introduce an enormous element of uncertainty into the process and subordinate the Commission's license process to . . . the processes of the water quality certification agency.").

Since 1987, FERC regulations have provided that a State waives its certification power unless it "grant[s] or den[ies]" a certification request within one year. *Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act*, 52 Fed. Reg. 5446, 5446 (Feb. 23, 1987). See also 18 C.F.R. § 4.34(b)(5)(iii).

3. California's Process for Addressing Water-Quality Certifications

The State Water Board is the California agency that decides applicants' requests for water-quality certifications required for FERC licensing proceedings for hydroelectric projects. Cal. Water Code § 13160. Starting in 2000, California law required that review of a project under CEQA be complete *before* the State Water Board could issue a water-quality certification. See Cal. Pub. Res. Code § 21100(a); Cal. Code Regs., tit. 23, § 3856(f).[3] As the Ninth Circuit recognized, CEQA

[3] In 2020, California amended its law to allow the State Water Board to issue water-quality certifications without a final CEQA

review is virtually impossible to complete within Section 401's one-year period for acting on water-quality certifications. See App. 8a.

CEQA also provides that where a project is subject to Federal and State regulation, the applicant should utilize the relevant Federal agency's EIS and should not conduct the CEQA-mandated review until after FERC issues its EIS. Cal. Pub. Res. Code § 21083.7(a). Because an applicant must file its request for water-quality certification no later than 60 days after FERC's notice that the project is ready for environmental analysis, and because FERC's preparation of an EIS for any large project generally takes longer than a year, the requirement that public agencies like the State Water Board rely on a FERC EIS effectively requires that the environmental review of FERC-licensed hydroelectric projects will take more than a single year.

As a result, and notwithstanding Section 401's one-year deadline, in California, "a practice has developed over the last several decades . . . whereby project applicants withdraw their requests for certification before the end of the one-year review period and resubmit them as new requests." App. 8a. This allowed "the project applicant more time to comply with procedural and substantive prerequisites to certification *and the State more time to decide whether and under what*

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review if necessary to avoid waiver under Section 401, *see* Cal. Pub. Res. Code § 13160(b)(2), purporting to subject such certifications to California's unilateral authority to reopen and revise them. If Section 401 can be evaded by California's withdrawal-and-refile procedure, the new law is irrelevant because the State Water Board can use that procedure to postpone taking action on certification requests indefinitely. The Ninth Circuit's decision allows California to avoid acting on numerous requests for water-quality certification currently pending before it.

conditions it will grant the certification request." *Id.* (emphasis added).[4]

4. *Hoopa Valley*

In 2019, the D.C. Circuit issued a significant decision interpreting Section 401(a). It held that "a coordinated withdrawal-and-resubmittal scheme," executed by California, Oregon, and a project applicant constituted a waiver of the States' certification power. *Hoopa Valley*, 913 F.3d at 1105. The court explained that Section 401 establishes a "one-year maximum" for a State to act on a certification request or waive its power to do so. *Id.* at 1103-04. A withdrawal-and-refiling scheme contravenes Congress's intent by "indefinitely delay[ing] federal licensing proceedings" and "usurp[ing] FERC's control over whether and when a federal license will issue." *Id.* at 1104. In that case, because California and Oregon had worked with the project applicant to implement the scheme, the court held that the States had waived their certification authority. *Id.*

Although FERC had previously accepted the withdrawal-and-refile process as sufficient to avoid waiver, it thereafter complied with the D.C. Circuit's interpretation of Section 401. Since that decision, FERC has consistently held that a State waives its certification

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[4] The three cases at issue reflect the State Water Board's default practice. *See also Placer Cnty. Water Agency*, 167 FERC ¶ 61,056 (withdrawal and resubmittal seven times), *reh'g denied*, 169 FERC ¶ 61,046 (2019); *S. Cal. Edison Co.*, 170 FERC ¶ 61,135 (withdrawal and resubmittal over an almost two-decade-long period), *on reh'g*, 172 FERC ¶ 61,066 (2020); *Pac. Gas & Elec. Co.*, 170 FERC ¶ 61,232 (2020) (withdrawal and resubmittal nine times); *S. Feather Water & Power Agency*, 171 FERC ¶ 61,242 (2020) (withdrawal and resubmittal 10 times); *Pac. Gas & Elec. Co.*, 172 FERC ¶ 61,064 (2020) (withdrawal and resubmittal sixteen times).

authority if it initiates or coordinates a process to withdraw-and-refile a request to evade Section 401's mandatory one-year time limit.[5]

5. FERC Proceedings

Petitioners hold federally issued licenses for the projects described below. In accordance with the FPA, petitioners timely applied to FERC to relicense their projects. As required by FERC's regulations, see 18 C.F.R. § 5.23(b)(1)(ii), petitioners then applied to the State Water Board for water-quality certifications within 60 days of the completion of FERC's "ready for environmental analysis" notice in their respective licensing proceedings. None received a water-quality certification within one year of its request.

Instead, as described below, each petitioner annually withdrew and then resubmitted its request for certification. As part of the State Water Board's established practice, the Board either directly requested that petitioners withdraw-and-refile their requests or coordinated with petitioners in this withdraw-and-refile scheme.

Merced Projects. Merced is the licensee for the Merced River Project and Merced Falls Hydroelectric Project, both on the Merced River in California. These projects, which generate, respectively, 101.25 and 3.44 megawatts of electricity, were first licensed in 1964 and 1969, for 50- and 45-year terms. App. 15a. Both licenses expired in 2014. The projects continue to be operated under annual licenses.

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[5] *See, e.g.*, *Pac. Gas & Elec.*, 170 FERC ¶ 61,232 (2020); *S. Cal. Edison Co.*, 170 FERC ¶ 61,135 (2020); *S. Feather Water & Power Agency*, 171 FERC ¶ 61,242 (2020); *Placer Cnty. Water Agency*, 167 FERC ¶ 61,056 (2019).

Merced and its predecessor filed with FERC applications for new licenses for these projects in 2012. As required by FERC's regulations, they originally filed requests with the State Water Board for water-quality certifications in 2014.

On April 21, 2015, the Water Board emailed Merced:

> Merced Irrigation District's application for water-quality certification for the Merced River Hydroelectric Project, FERC Project No. 2179[,] expires on May 21, 2015. Please withdraw the [sic] and simultaneously resubmit an application for water quality certification prior to May 13, 2015. If you have any questions regarding this request or this process, please feel free to contact me.

App. 16a-17a.

Merced complied. FERC issued its final EIS for this project in December 2015. Nonetheless, Merced withdrew-and-refiled substantively identical requests for water-quality certifications in 2016, 2017 and 2018. App. 17a.

In April 2019, the State Water Board denied without prejudice the fourth request for certification, citing the absence of a CEQA environmental-review document. App. 17a. In May 2019, Merced sought from FERC a declaratory order that the Board had violated Section 401 and forfeited its certification authority. App. 17a.

Yuba Project. Yuba is the licensee of the 361.9-megawatt Yuba River Development Project on Oregon Creek and the Yuba, North Yuba, and Middle Yuba Rivers in Northern California. App. 13a. The license for this project was scheduled to expire in April 2016. Yuba continues to operate under annual licenses.

In April 2014, Yuba filed its application for a new license with FERC. In August 2017, it requested

water-quality certification from the State Water Board. On July 25, 2018, the Board emailed Yuba the following direction:

> [Yuba]'s water quality certification action date for the Yuba River Development Project (FERC No. 2246) is August 24, 2018. A final CEQA document for the Project has not been filed; therefore, the State Water Board cannot complete the environmental analysis of the Project that is required for certification. . . . Please submit a withdraw/resubmit of the certification application as soon as possible.

App. 14a.

Yuba replied that same day: "Phil – we plan to submit the withdrawal/ resubmittal letter on August 20. Will that work for you?" The Board staff promptly replied: "My management usually gets a little antsy when our action date gets below 3 weeks because a 'deny without prejudice' letter takes time to route to our Executive Director. If possible, please submit the letter by next Friday." App. 14a. Yuba complied, withdrawing-and-refiling its request for a water-quality certification on August 3, 2018. App. 14a.

On July 31, 2019, the Board denied the request without prejudice and directed Yuba to file a new request for certification. App. 15a.

On August 22, 2019, Yuba sought from FERC a declaration that the State Water Board had waived its certification authority. App. 15a.

Nevada Project. NID is the licensee of the 79.92-megawatt Yuba-Bear Hydroelectric Project on the Middle Yuba, South Yuba, and Bear Rivers in Sierra, Nevada and Placer Counties in California. This project's original 50-year license was scheduled to expire

in April 2013. App. 10a. It continues to operate under annual licenses.

In April 2011, NID filed an application with FERC for a new license. In March 2012, NID filed its original water-quality certification request with the State Water Board. In 2013, the Board asserted that because its review could not be completed by spring 2014, "the most likely action will be that the Licensees will withdraw and resubmit their respective applications for water quality certifications before the one year deadline." App. 11a-12a.[6] In fact, NID withdrew-and-refiled its request six times between 2013 and 2018. App. 12a. The request was never changed. FERC issued a final EIS for the project on December 19, 2014. App. 11a.

On January 25, 2019, the State Water Board denied without prejudice NID's seventh certification request, explaining that the State CEQA request remained pending and directing NID to file another request "to maintain an active certification application." App.12a, 36a-37a.

On February 19, 2019, NID sought from FERC a declaratory order that the State had waived its Section 401 certification authority. App. 37a.

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[6] The Ninth Circuit denied NID's request for judicial notice of indisputably authentic emails from the Board to NID, because NID had not produced those emails to FERC. Order at 4, *Cal. State Water Res. Control Bd.* v. *FERC*, No. 20-72432 (9th Cir. Aug. 4, 2022), ECF No. 114. Those email communications are consistent with the Board's interactions with Yuba and Merced. *E.g.*, January 8, 2018 email from Mr. Philip Choy, a State Board project manager, to NID: "As done in the past, please withdraw and resubmit NID's application for water-quality certification for the Yuba-Bear Project by January 26, 2018." NID Mot., Ex. 1.

6. FERC Orders on Review

For the three matters at issue, FERC held that the State Water Board waived its Section 401 water-quality certification authority. It relied on *Hoopa Valley*, where the D.C. Circuit held that State-applicant coordination to withdraw and resubmit a certification request contravenes Congress's express one-year deadline for a State to decide such a request. See App. 40a-46a, 62a-70a, 89a-96a. Specifically, FERC determined that where a State and an applicant work together to avoid the one-year deadline, "*the State* . . . [has] fail[ed] or refuse[d] to act" on a certification request—the predicate for forfeiture. See 33 U.S.C. § 1341(a)(1) (emphasis added).

FERC found waiver in all three matters based on an undisputed record. In each case, FERC observed that under the State Water Board's regulations, this withdrawal-and-refile scheme was a recognized alternative to acting on a water-quality certification request and was routinely used in California. See App. 44a-45a n.60, 68a n.58, 96a n.80 (citing Cal. Code Regs., tit. 23 § 3836(c)).

Second, FERC explained that the State Water Board had expressly requested Yuba and Merced to withdraw-and-refile their certification requests before the one-year deadline expired. App. 65a-66a, 90a-91a. And, with respect to NID's project, FERC found the State Water Board "expected NID to repeatedly withdraw and resubmit its application to avoid the CWA's one-year deadline," App. 44a, and acknowledged the State Water Board's prior comments that withdrawal and refiling were appropriate to afford *itself* an extension of time to act. App. 45a. FERC thus concluded that the Board's communications conveyed the Board's position that licensees should withdraw-and-refile their requests so that the *Board* could defy Section

401's explicit one-year deadline. FERC rejected the State Water Board's argument that the withdraw-and-refile procedure served the lawful purpose of allowing the State to complete its own environmental review process, holding that this was "immaterial" to the question of waiver under Section 401, and that reliance on a State regulatory process did not excuse the State from complying with the CWA's deadline. App. 45a-46a, 67a, 94a-95a.

7. Ninth Circuit Decision

The Ninth Circuit vacated FERC's orders. The court recognized that Section 401 requires States to provide a water-quality certification before a federal license can issue, and that States must act on requests for water-quality certification within one year to avoid forfeiting their authority. App. 5a. The court held, however, that the State Water Board had merely "acquiesced" in petitioners' own decisions to withdraw-and-refile their requests, that FERC's decision that the State Water Board coordinated petitioners' use of the withdraw-and-refile scheme was not based on substantial evidence, and therefore that the State had not waived its water-quality certification authority. App. 22a.

In doing so, the court recognized that California's environmental review process routinely takes more than a year, and therefore that, due to State law, the State Water Board virtually always requires more than a year to decide water-quality certification requests, App. 8a. Moreover, California law—specifically, the Board's regulations—recognized withdrawal-and-refiling as an acceptable response to avoid deciding a request within a year, *id.* (citing Cal. Code Regs., tit. 23 § 3836(c)). Thus, to accommodate California's environmental review process, the State Water Board had "over the last several decades" accepted the withdraw-

and-refile practice to give "the project applicant more time to comply with procedural and substantive prerequisites to certification *and the [S]tate more time to decide whether and under what conditions it will grant the certification request*." App. 8a (emphasis added).

Despite this context, the Ninth Circuit found that serial withdrawals-and-refilings did not trigger Section 401's deadline and thus did not result in a waiver of the State's authority under Section 401. Under the court's logic, the State may create a regime under which project applicants annually withdraw-and-refile requests for water-quality certifications, without regard to Section 401's one-year limit, simply because the environmental-review process required by State law cannot be concluded within a year.

The court also reviewed the documentary evidence of State Water Board involvement in the withdraw-and-refile schemes in these particular cases. In each case, the court acknowledged the Board's correspondence with petitioners, including the Board's initiation of, and requests for, Yuba's and Merced's withdrawal-and-refiling of their requests, see *supra* at 13, 14, and the Board's statement to FERC that it expected NID to withdraw-and-refile to avoid denial, *id.* at 15. The court recognized that FERC's decision had to be upheld if supported by substantial evidence. App. 18a. But the court disagreed with FERC's determination that the Board had "fail[ed] or refuse[d] to act," instead characterizing the Board as "acquiesce[ing]" in petitioners' decisions. App. 22.

Although the Ninth Circuit recognized that the State had established legal requirements that did not allow the State Water Board to act on requests for certification within the required year and had authorized the withdraw-and-refile process to address the State's requirements, the court nonetheless rejected FERC's

determination that the Board was sponsoring the withdraw-and-refile regime to extend its time for acting. Instead, the court speculated without evidence that petitioners could benefit from delay in these cases because they were "operating under interim, annual licenses that were not subject to state-imposed water quality conditions." App. 26a. The court discounted FERC's response that had the Board denied the requests, petitioners could have challenged those decisions in state court. App.23a-24a n.13.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision conflicts with decisions of the D.C. and Second Circuits on a recurring issue of substantial legal and practical importance for the licensing of numerous significant hydropower projects across the country. Because appeals from FERC waiver decisions can be brought in either the D.C. Circuit or the relevant regional circuit court of appeals, this conflict will result in forum shopping until this Court steps in. Finally, the Ninth Circuit's decision makes a mockery of the explicit time limit Congress enacted in Section 401. Review is warranted.

I. THE NINTH CIRCUIT'S DECISION DEEPENS THE CONFLICT AMONG THE COURTS OF APPEALS ON THE MEANING OF SECTION 401.

As the Ninth Circuit found, "California's criteria for issuing water quality certifications often make it impracticable for a certification to issue within one year of a project applicant's submitting its request." App. 6a. As a result, and as these cases reflect, the State Water Board adopted the practice of instructing or arranging for project applicants annually to withdraw-and-refile their requests for water-quality certification, sometimes for as long as a decade, so that the

Board does not have to act within one year. The State Water Board's correspondence with petitioners reflects this well-established state of affairs in California.

The Ninth Circuit asserted it was not interpreting Section 401, just finding that FERC's decision was not supported by substantial evidence. App. 22a. This claim defies reality. FERC based its decisions on California law (which tied the State Board to environmental review that took more than a year), and the State Water Board's requests or assumption that applicants would withdraw-and-refile, rather than having the Board deny their requests. This reasoning was further supported by the Board's correspondence with petitioners. Neither the State's legal requirements nor the Board's routine practice was disputed. The question was whether, on this undisputed record, the State Water Board had "fail[ed] or "refuse[d] to act" and thus waived its Section 401 authority. That is not a substantial evidence question; that is a legal issue. As demonstrated below, the Ninth Circuit's decision that the Board did not "fail or refuse to act" necessarily reflects an interpretation of what those statutory terms mean that the D.C. and Second Circuits would reject.

In *Hoopa Valley*, the D.C. Circuit first examined the Section 401's text, and found it "clear" that a full year is "the absolute maximum" period in which a state must act on a request. 913 F.3d at 1104. See *N.Y.* State *Dep't of Env't Conservation* v. *FERC*, 884 F.3d 450, 455 (2d Cir. 2018) ("New York Dep't I") (Section 401 establishes "a bright-line rule . . . [that] the timeline for a state's action regarding a request for certification 'shall not exceed one year'"). The court found the States had waived their Section 401 authority, stating "[t]he pendency of the requests for state certification . . . has far exceeded the one-year maximum," because

the applicant had filed its original requests over a decade before. *Hoopa Valley*, 913 F.3d at 1104.

The court expressly rejected the contention that each withdrawal-and-refiling of the certification request somehow reset the statutory deadline, saying "[d]etermining the effectiveness of such a withdrawal-and-resubmission scheme is an undemanding inquiry because Section 401's text is clear." *Id.* at 1103. The court observed that each year, the applicant had sent a letter withdrawing and resubmitting the "very same" request, and that the States' "deliberate and contractual idleness defie[d] [Section 401(a)'s] requirement" that the State act within a year. *Id*. at 1104. Thus, the court explained, the project applicant's refilings "were not new requests at all." *Id.* This scheme, the court stated, "does not exploit a statutory loophole; it serves to circumvent a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project." *Id.*

In sum, the D.C. Circuit explained that "if allowed, the withdrawal-and-resubmission scheme" to which the States had agreed "could be used to indefinitely delay federal licensing proceedings and undermine FERC's jurisdiction to regulate such matters." *Id.* See *id.* ("By shelving water quality certifications, the states usurp FERC's control over whether and when a federal license will issue.").

Plainly, under *Hoopa Valley*'s analysis, the D.C. Circuit would have found that the State "fail[ed] or refuse[d] to act" on petitioners' requests and thus forfeited its Section 401 authority. That court focused on the plain text of Section 401 and the clarity of the statutory deadline, and explained that allowing a withdraw-and-refile scheme would result in "indefinite[] delay" of federal licensing proceedings, and "undermine FERC's jurisdiction." *Id.* California's use of this

scheme here to evade Section 401's deadline is no different. California's legal regime—like the settlement agreement in *Hoopa Valley*—required that the State Water Board take more than a year to respond to requests for water-quality certification and then instructed or presumed applicants would use the withdraw-and-refile regime to allow the Board to avoid the one-year deadline. The D.C. Circuit would have concluded that, in these circumstances, as in *Hoopa Valley*, the State has waived its authority under Section 401.

The Ninth Circuit's apparent attempt to distinguish *Hoopa Valley* (because the State's involvement in the withdraw-and-refiling scheme involved a contract rather than an established practice at the States' behest) is a distinction without a difference. Nothing in *Hoopa Valley*'s analysis of Section 401 suggested that the fact that the State acted through *a contract*, rather than an established practice, made a difference. In both cases, the State tied its own hands and then sought to use withdraw-and-refile to take more time than Section 401 allows. On the undisputed record, California had an established regime under which project applicants withdrew-and-refiled water-quality certification requests to give the State Water Board more time, thus allowing the State to avoid the statutory deadline. Accordingly, in both *Hoopa Valley* and this case, the State "fail[ed] or refuse[d]" to act on a water-quality certification request within a year and waived its authority. The Ninth Circuit's acceptance of the State Board's practice—and its decision that the State's practice did not constitute a "fail[ure] or refus[al] to act" within a year—conflicts with the D.C. Circuit's interpretation of Section 401.

Nor can the Ninth Circuit's decision be reconciled with the Second Circuit's decisions in Section 401

cases that the Ninth Circuit failed to acknowledge, let alone distinguish. In *New York State Department of Environmental Conservation* v. *FERC*, 991 F.3d 439, 447-49 (2d Cir. 2021) ("*New York Dep't II*"), the Second Circuit invalidated a State scheme to evade Section 401(a)'s one-year limit to act. There, the project applicant and the State agreed to redefine the date on which New York had received the applicant's certification request, thus purporting to use State law to allow the State 36 additional days to act on the request. *Id.* at 443.

Relying on *Hoopa Valley*, the Second Circuit rejected this effort to circumvent the statutory deadline, explaining that Section 401 establishes a "bright-line rule" that States have one year to act on certification requests or waive their authority, and that the statute "precludes the line-blurring arrangement under review in this case." *Id.* at 449-50. The court explained that it was "bound by what we believe to be Congress' intention expressed in the text of Section 401 and reinforced in its legislative history *to reduce flexibility in favor of protecting the overall federal licensing regime*." *Id.* at 450.

In *New York Dep't I*, 884 F.3d at 455, the Second Circuit also refused to allow the State to circumvent the deadline in Section 401. Here the State had set the start date of its review process as the date a request for water-quality certification is "complete," using State law to give the State discretion to decide when the request meets that standard. *Id.* at 455-56. The court explained that Section 401 cannot be interpreted to require a "complete" request because that would allow the State to dictate when the review process begins *and* to delay it indefinitely. *Id.*

The Second Circuit thus has refused to "blur [Section 401's] bright-line rule into a subjective standard." *New*

York II, 991 F.3d at 448 (quoting *New York I*, 884 F.3d at 456). In its view, both the statute's text and its "legislative background" "show[] with a good deal of clarity that limiting a certifying state's discretion and eliminating a potential source of regulatory abuse was what the one-year limit in Section 401 was intended to achieve." *Id.* The Second Circuit thus has twice refused to allow New York to interpret the law governing the application of Section 401 in a way that would allow the State to circumvent the statute's one-year deadline. In contrast, the Ninth Circuit allowed California to do so.

Under the Second Circuit's approach, including its approving citation of *Hoopa Valley*, California's invocation of the state-law CEQA review process and its use of the withdrawal-and-refiling scheme to alter and extend the statutory review period would have been rejected. Indeed, the Second Circuit has expressly indicated that it would go further than the D.C. Circuit: It stated that, although there was "no indication that [New York] engaged in the kind of 'deliberate and contractual idleness' found in *Hoopa Valley*," New York's efforts to circumvent the statutory review period nonetheless contravened Section 401. *Id.* at 450.[7]

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[7] In *Hoopa Valley*, the D.C. Circuit correctly rejected arguments relying on "*dicta*" in *New York Dep't II* to suggest that the Second Circuit would approve withdraw-and-refile as a device to evade Section 401's one-year requirement. In fact, as the D.C. Circuit explained, the Second Circuit said only that, "in light of various practical difficulties, . . . a state could 'request that the applicant withdraw and resubmit the[ir] application.'" *Hoopa Valley*, 913 F.3d at 1105 (quoting *New York Dep't II*, 884 F.3d at 455-56). "The *dicta* was offered to rebut the state agency's fears that a one-year review period could result in incomplete applications and premature decisions." *Id.*

The Fourth Circuit, too, has addressed the question of when a State has waived its Section 401 certification authority in connection with a withdrawal-and-refiling scheme. Its approach conflicts with that of the D.C. Circuit and Second Circuit, but appears consistent with that of the Ninth Circuit. In *North Carolina Department of Environmental Quality* v. *FERC*, 3 F.4th 655 (4th Cir. 2021) ("*NCDEQ*"), a project applicant "initiated" a discussion with NCDEQ by asking to "discuss refiling," and the State agency responded by informing the applicant about the process for refiling. *Id.* at 662-63. The next year, the NCDEQ informed the applicant that it would not be able to meet the one-year time limit; the applicant then informed the NCDEQ that it would withdraw-and-refile its request. Again, the following year, after a reminder from the NCDEQ, the applicant withdrew-and-refiled its Section 401 request. *Id.* at 663. FERC held that the NCDEQ's "ongoing agreement" with the applicant that it would withdraw-and-resubmit its request for a period exceeding a year constituted a waiver of the State's Section 401 certification authority. *Id.* The Fourth Circuit vacated FERC's order.

The court held that, on the undisputed record before it, the project applicant had "initiated the withdrawals and resubmissions"; that, "in both instances, [the project applicant] raised the prospect of withdrawing and resubmitting its application"; and that the NCDEQ "did not broach the subject, but merely answered questions and reminded [the applicant] of the time frame if it intended to proceed." *Id.* at 672-73. In that setting, the court declined to find that *the State* had "fail[ed] or refuse[d] to act" within a year.

But in its analysis, the court of appeals also characterized *Hoopa Valley*'s waiver analysis as "a very narrow decision flowing from a fairly egregious set of

facts," in which state agencies *contractually* agreed to take no action on the applicant's repeated certification requests. *NCDEQ*, 3 F.4th at 669. This restricted understanding of *Hoopa Valley*—and of when a State "fail[s] or refuse[s] to act"—conflicts with both the Second Circuit's interpretation of Section 401 and the D.C. Circuit's view of its own precedent.[8]

Both the D.C. and Second Circuits would have held that the State Water Board waived its Section 401 authority on the record here. The Ninth Circuit's decision—and its reluctance to find waiver—is arguably consistent, however, with the Fourth Circuit's approach. There is accordingly, a mature conflict among the courts of appeals on the important question of when a State has "fail[ed] or refuse[d] to act" on a request for water-quality certification, and waived its Section 401 authority.

Allowing *this* conflict to persist is particularly problematic. Under the statutory regime for FERC licensing, a dissatisfied State or project applicant can appeal directly to *either* the D.C. Circuit *or* the circuit court of appeals for the region in which the federally licensed project is located. See 16 U.S.C. § 825*l*(b); 33 U.S.C. § 1369(b)(1). Thus, the conflict between the Ninth and D.C. Circuits' interpretations of Section 401 will inevitably lead to forum shopping. Section 401 of the CWA is a critically important federal law, and it should not have different meanings in different States, indeed

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[8] This cramped view of *Hoopa Valley* is inconsistent with a recent D.C. Circuit opinion's citation with approval of *Placer Cnty. Water Agency*, 167 FERC ¶ 61,056, a FERC decision holding that California waived its Section 401 authority by coordinating a withdrawal-and-refiling scheme with a project applicant, *without any contractual agreement to do so*. *See Turlock Irrigation Dist.* v. *FERC*, 36 F.4th 1179, 1183 n.5 (D.C. Cir. 2022), *cert. pending*, No. 22-616 (U.S. Jan. 6, 2023).

potentially within a single State if different project applicants appeal to the D.C. Circuit and the regional court of appeals, respectively. See *Arkansas* v. *Oklahoma*, 503 U.S. 91, 110 (1992) (CWA was intended "to create and manage a uniform system of interstate water pollution regulation").

This conflict warrants this Court's intervention.

II. THE ISSUE PRESENTED IS RECURRING AND IMPORTANT

FERC licenses and relicenses all hydropower projects in the United States—projects that play a critical part in powering the Nation's economy and households. "In the decade of the 2020's, 281 licenses that currently authorize 12% (4.7 [gigawatts]) of installed FERC-licensed hydropower capacity and 50% (9.1 [gigawatts]) of FERC-licensed [pumped storage hydropower] are set to expire." U.S. Dep't of Energy, *U.S. Hydropower Market Report* at 40 (Jan. 2021).[9] FERC cannot issue license renewals for these projects without Section 401 water-quality certifications from the States where the projects discharge into federal jurisdictional waters. Moreover, proposed projects throughout the nation in various stages of FERC's licensing process will not be able to obtain licenses for construction and operation without State water-quality certification or waiver. See FERC, *Licensing: Pending License, Relicense, and Exemption Applications*.[10]

"[T]he most common cause of delayed hydropower licensing proceedings is untimely receipt of state water-quality certification[s]" under Section 401. Claudia Copeland, *Clean Water Act Section 401: Background*

[9] *See* https://www.energy.gov/sites/default/files/2021/01/f82/us-hydropower-market-report-full-2021.pdf.

[10] *See* https://ferc.gov/licensing (last visited Jan. 31, 2022).

and Issues, Cong. Rsch. Serv. at 6 (July 2, 2015).[11] The split Federal-State approval process can result in "a series of sequential administrative and State court and Federal court appeals that [could] kill a project with a death by a thousand cuts just in terms of the time frames." *Natural Gas Symposium*; *Symposium Before the S. Comm. On Energy Natural Res.*, 109th Cong. 41 (2005). That is because delay can suspend the development of projects and jeopardize their funding.

The question presented here is whether States can evade Congress's enactment of an explicit one-year deadline in Section 401 and indefinitely delay FERC's licensing and relicensing of projects by actively participating in and encouraging withdraw-and-resubmit schemes, as long as they do not enter into formal agreements with project applicants and instead just "request" or require applicants to withdraw-and-resubmit. If States can do so, they will be able effectively to hold up numerous important hydropower projects contrary to Congress's express intent, simply by letting applicants know, *sotto voce*, that the State will not look favorably on applicants who do not withdraw-and-refile. This delay, of course, is precisely what Section 401's strict one-year deadline was intended to avoid.[12] The region covered by the Ninth Circuit includes a significant percentage of the Nation's hydroelectric

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[11] *See* https://ferc.gov/licensing.

[12] The State Water Board has a history of resistance to FERC control over hydroelectric projects in the State. *See California* v. *FERC*, 495 U.S. 490 (1990) (State Water Board's efforts to impose conditions on FERC license are preempted); *Sayles Hydro Assocs.* v. *Maughn*, 985 F.2d 451, 456 (9th Cir. 1993) (finding State Water Board requirements preempted, and declining to impose sanctions, while observing "the Board's unwillingness to accept the meaning of the result it obtained in *California* v. *FERC* gives us pause").

resources. Thus, that Circuit's erroneous view of Section 401 will have a disproportionate effect on FERC's ability to license and relicense hydroelectric and other projects subject to the CWA.

The numbers above show that the question presented is recurring as well as important. Numerous FERC decisions find that States have waived their Section 401 authority by their involvement in and coordination of withdrawal-and-resubmission schemes to avoid acting on requests for water-quality certifications. See *supra* at nn. 4 & 5. Four Circuits have already addressed Section 401 waiver questions and considered State schemes to avoid the one-year deadline, illustrating that some States are strongly resisting Congress's instruction that they must act on water-quality certification requests in one year. Indeed, the D.C. Circuit recently approved a similar scheme to circumvent Section 401's time limit for State action. Although it distinguished withdraw-and-refile schemes—which the court had rejected as violating Section 401 in *Hoopa Valley*—that Circuit approved yet another statutory interpretation evading the one-year limit. See *Turlock Irrigation Dist.* v. *FERC*, 36 F.4th 1179, 1183 (D.C. Cir. 2022), *cert. pending*, No. 22-616 (U.S. Jan. 6, 2023). Until this Court provides guidance about Section 401, State schemes to evade its limits will proliferate.

III. THE NINTH CIRCUIT'S DECISION IS WRONG.

"Section 401's text is clear." *Hoopa Valley*, 913 F.3d at 1103. "[A] full year is the absolute maximum" for a State to decide a project applicant's water-quality certification request. *Id.* at 1104; see *id.* at 1100 ("statutory waiver is mandated after a request has been pending for more than one year"). "The plain language of Section 401 outlines a bright-line rule" providing that

the one-year clock commences upon a State's receipt of a certification request. *New York I*, 884 F.3d at 455-56.

Thus, the only question here is whether California can avoid acting on a project applicant's request for water-quality certification by establishing a legal regime where the State's decision necessarily takes more than a year and instructing or presuming that applicants will withdraw-and-resubmit the same request year after year before the one-year deadline expires. Petitioners acknowledge that it must be *the State* which "fail[s] or refuse[s] to act" under Section 401. Thus, a State does not waive its authority if applicants *independently* withdraw their requests for certification and then later resubmit those requests. But where, as here, there is an established State practice of "fail[ing]" to act on requests for a year to accommodate a State's environmental-review requirements, and of instead instructing or urging applicants to withdraw-and-refile, the State has waived its authority under Section 401.

No express State "refus[al]" is required, as the Ninth Circuit seemed to believe: A State practice of establishing, coordinating, and participating in a withdrawal-and-refiling regime constitutes a "fail[ure]" to act and thus a waiver. Indeed, the high volume of withdrawals-and-refilings in California cements the State's involvement in the scheme. Perhaps the clearest illustration of the State's initiation of this practice for its own purposes comes in the State Water Board's instruction to Yuba:

> The State Water Board cannot complete the environmental analysis of the Project that is required for certification. Please submit a withdraw/resubmit of the certification application as soon as possible.

See *supra* at 13; see also *supra* at 13-15 (describing record of State Water Board interactions with Merced and NID).

Put simply, Section 401 establishes a one-year maximum for the State to act, and the State may not set up or sponsor a system to afford itself more time.[13] Cf. *New York II*, 991 F.3d at 450 (refusing to allow the State to create a rule "blurring" Section 401's "one-year" deadline to give itself additional time).

The CWA's legislative history underlines the plain text. The Conference Report states: "In order to insure that sheer inactivity by the State . . . will not frustrate the federal application, a requirement . . . is contained in the conference substitute that if within a reasonable period, which cannot exceed one year, after it has received a request to certify, the State … fails or refuses to act on the request for certification, then the certification requirement is waived." H.R. Rep. No. 91-940, at 55 (1970) (Conf. Rep.), *as reprinted in* 1970 U.S.C.C.A.N. 2712, 2741. See also *Hoopa Valley*, 913 F.3d at 1104-05 ("Congress intended Section 401 to curb a state's 'dalliance or unreasonable delay'" (quoting 115 Cong. Rec. 9264 (1969)); *Alcoa Power*, 643 F.3d at 972 (Section 401's purpose "is to prevent a State from indefinitely delaying a federal licensing

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[13] It is not relevant whether the project applicants reluctantly or enthusiastically withdrew-and-refiled their requests for water-quality certification. For purposes of Section 401, what matters is whether the State was sponsoring the scheme for its own purposes. The undisputed record here makes the State's involvement in this and many other withdrawals-and-resubmissions clear. *See supra* at 9-10, 12-15. In any event, allowing the State to avoid waiver by invoking the applicants' conduct would, in essence, impose "equitable tolling" to defeat a mandatory time limit and "essentially gut" the regime Congress imposed. *See Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 157 (2013).

proceeding by failing to issue a timely water-quality certification"). The Ninth Circuit's decision allows California to set up a legal regime that evades this requirement and unreasonably delays FERC proceedings.

Moreover, the Ninth Circuit's decision—that the State's regime here does not constitute a waiver—would undermine the purpose of Section 401. It would "consume Congress's generally applicable statutory limit." *Hoopa Valley*, 913 F.3d at 1105. A State with an established withdrawal-and-refiling scheme could delay acting on a water-quality certification request indefinitely, in turn preventing FERC from acting. Allowing "[s]uch an arrangement" would "circumvent [FERC's] congressionally granted authority over . . . licensing," and "usurp FERC's control over whether and when a federal license will issue." *Id.* at 1104.[14] Under the Ninth Circuit's view, States may pass laws and regulations that effectively require them to extend Section 401's one-year time limit, without any concern about the strictures of Section 401.

Under the State's interpretation, the State can avoid deciding a project applicant's certification request after one year, and nonetheless forestall waiver by the simple expedient of having the applicant withdraw-and-refile the identical request over and over again. And because FERC may not issue a federal license until the State grants certification or waives its power to do so, on the State's view, it can indefinitely delay a federal license. It would plainly "'frustrate the Federal

[14] Since *Hoopa Valley* was handed down, FERC has declined to find waiver where project applicants independently withdrew requests for water-quality certifications, but has consistently found waiver where the State acted for its own purposes. *Compare* cases cited *supra* at n.5 *with Vill. of Morrisville*, 174 FERC ¶ 61,141, at 8, 12 (2021).

application' . . . if the State's inaction, or incomplete action, were to cause the federal agency to delay its licensing proceeding." *Alcoa Power*, 643 F.3d at 972 (quoting H.R. Rep. No. 91-940, at 56 (1970)).

The purpose of California's established practice and its withdrawal-and-refiling scheme is to grant the State Water Board an extension of time to act on water-quality certification requests in order to fulfill the State's purposes in direct violation of Section 401's deadline. The Ninth Circuit's contrary decision expands a conflict among the Circuits, and defies Congress's clear text and purpose.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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