

No. 26-

IN THE
Supreme Court of the United States

AFFIRMED ENERGY LLC,
Petitioner,
v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,
Respondents.

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

Ratemaking by federal agencies, including of interstate energy markets, is typically governed by the “filed rate doctrine.” The doctrine constrains regulated entities from charging a rate that is unjust or unreasonable, or that deviates from the terms officially on file with the regulating agency, including through a tariff. The doctrine, which extends to rate-related classifications, practices, and regulations, has long been held to prohibit retroactive changes by federal agencies, including, as relevant here, the Federal Energy Regulatory Commission. That prohibition is of paramount importance to maintaining the stability and predictability of the Nation’s multi-billion-dollar energy markets, among other things.

In the decision below, the D.C. Circuit held, in conflict with the Third Circuit, that FERC’s approval of a change to a tariff governing certain wholesale energy capacity auctions was not retroactive, even though the change divested a participant in those auctions of a vested right it had acquired under the prior tariff rules. In doing so, the Circuits divided on the antecedent question of when a change in law is retroactive, a question with far-reaching implications beyond the filed rate doctrine. The question presented is:

Whether, as the Third Circuit held, a legal change is retroactive if it eliminates an entitlement acquired under prior law through a completed past act, even if the entitlement would have been exercised only in the future, or whether, as the D.C. Circuit held, a legal change is retroactive only if it alters the past legal consequences of the completed act.

PARTIES TO THE PROCEEDING

Petitioner (petitioner below) is Affirmed Energy LLC.

Respondents are the Federal Energy Regulatory Commission (respondent below), PJM Interconnection, L.L.C. (intervenor-respondent below), and Monitoring Analytics, LLC (intervenor-respondent below).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Affirmed Energy LLC certifies that Petitioner Affirmed Energy LLC is a wholly owned subsidiary of American Efficient LLC, which is a wholly owned subsidiary of AmEff Holdings Inc., which is a wholly owned subsidiary of MIH LLC, which is a wholly owned subsidiary of MIH Energy Holdings LLC, which is a wholly owned subsidiary of Modern Energy Group LLC. No publicly held corporation or other publicly held entity owns 10% or more of the stock of Affirmed Energy LLC. On July 18, 2026, Affirmed Energy LLC filed for bankruptcy. *See* Voluntary Petition Under Chapter 11, *In re Affirmed Energy LLC*, No. 26-bk-30969 (Bankr. W.D.N.C. July 18, 2026), Dkt. 1.

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INTRODUCTION

In the decision below, a divided panel of the D.C. Circuit held that the Federal Energy Regulatory Commission’s approval of a tariff change that stripped a party of a vested tariff-based right to participate in future energy auctions was not retroactive. The majority held that because FERC’s actions affected only the party’s “future” exercise of the right they were prospective only and so did not implicate the filed rate doctrine, which prohibits retroactive application of tariff changes. The D.C. Circuit’s limited retroactivity standard is profoundly wrong, conflicts with a Third Circuit decision in an analogous context, clashes with multiple decisions of

this Court, and exacerbates decades of confusion in the federal courts regarding the test for retroactivity, both in the context of the filed rate doctrine and more broadly.

This Court’s review is warranted for several reasons. In the first place, the D.C. Circuit’s adoption of a “future effect” test for retroactivity directly conflicts with the Third Circuit’s decision in *PJM Power Providers Group v. FERC*, 96 F.4th 390, 399-401 (3d Cir. 2024). In that case, the Third Circuit held that FERC’s approval of an analytically analogous tariff amendment governing the same auction process for the same organization was impermissibly retroactive because FERC altered a future legal consequence that had been guaranteed under the tariff based on the completion of a past event. In doing so, the Third Circuit rejected the very “future effect” argument FERC advanced, and the D.C. Circuit adopted, below. This Court’s review is warranted to ensure uniformity on application of retroactivity under the filed rate doctrine—a legal framework critically important to FERC’s superintendence of multi-billion-dollar electricity markets.

Certiorari is also justified because the D.C. Circuit’s “future effect” test clashes with multiple decisions of this Court, including *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and *Chew Heong v. United States*, 112 U.S. 536 (1884). Those decisions confirm that a legal change is retroactive either if it “attaches new legal consequences to events completed before its enactment” or if it “takes away or impairs [a] vested right[] acquired under existing laws.” *Landgraf*, 511 U.S. at 269-270 (quotation marks omitted). The rule against retroactivity thus protects against not only altering *past* legal consequences, but also depriving parties of *future* entitlements guaranteed as a result of acts undertaken under

prior law. In fact, *Landgraf* considered and rejected a version of the narrow “future effect” test the panel applied below, which Justice Scalia advanced in a concurrence in *Landgraf* and an earlier solo concurrence in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). See *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring in the judgment); *Bowen*, 488 U.S. at 219 (Scalia, J., concurring).

More broadly, the D.C. Circuit’s divided panel decision reflects and deepens confusion among federal courts as to the proper legal test for identifying retroactive laws and agency actions—a question of far-reaching consequence across a range of contexts beyond FERC. The question presented is important, recurring, and ripe for this Court’s resolution. This Court should grant the petition.

OPINIONS BELOW

The D.C. Circuit’s majority opinion and dissent (App.1a-51a) are reported at 166 F.4th 1070 (2026). The D.C. Circuit’s unpublished order denying rehearing en banc (App.159a-160a) is available at 2026 WL 1353433. FERC’s initial approval order (App.55a-112a) is reported at 189 FERC ¶61,095 (2024). FERC’s order denying Affirmed’s rehearing petition (App.113a) is reported at 190 FERC ¶62,005 (2025). FERC’s order addressing the arguments raised in Affirmed’s rehearing petition (App.115a-158a) is reported at 190 FERC ¶61,081 (2025).

JURISDICTION

The D.C. Circuit entered judgment in this matter on February 10, 2026. App.53a-54a. Petitioner timely filed for rehearing en banc, which the D.C. Circuit denied on May 7, 2026. App.159a-160a. On July 24, 2026, the Chief

Justice extended the time to file this petition through September 18, 2026 (No. 26A109). This Court has jurisdiction under 28 U.S.C. § 1254(1) and 16 U.S.C. § 825l(b).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix. App.161a-169a.

STATEMENT

A. The Rule Against Retroactivity

The presumption against retroactive government action is “deeply rooted” in the law and “embodies a legal doctrine centuries older than our Republic.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Retroactive actions “present[] problems of unfairness that are more serious than those posed by prospective [actions] because [they] can deprive citizens of legitimate expectations and upset settled transactions.” *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). Because “[r]etroactivity is not favored in the law,” this Court has held that “congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). “By the same principle, a statutory grant of legislative rule-making authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” *Id.*

By limiting exercises of governmental power that “attach[] new legal consequences to” completed events or that “take[] away or impair vested rights acquired under existing laws,” the rule against retroactivity promotes “creativity in both commercial and artistic

endeavors” by “giv[ing] people confidence about the legal consequences of their actions.” *Landgraf*, 511 U.S. at 265-266, 269-270 (quotation marks omitted).

The presumption against retroactivity applies across a host of statutory and regulatory contexts. This Court has applied it to subjects as varied as immigration, *see, e.g., Vartelas v. Holder*, 566 U.S. 257 (2012); attorney’s fees, *Martin v. Hadix*, 527 U.S. 343 (1999); habeas corpus, *Lindh v. Murphy*, 521 U.S. 320 (1997); qui tam suits, *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997); civil rights, *Landgraf*, 511 U.S. 244; and Medicare regulations, *Bowen*, 488 U.S. 204, among others.

B. Retroactivity Under The Federal Power Act

One area in which retroactivity analysis plays an important role is federal energy regulation. The Federal Power Act grants FERC the authority to regulate “the transmission of electric energy in interstate commerce” and the “sale of electric energy at wholesale in interstate commerce.” 16 U.S.C. § 824(b)(1). Consistent with that delegated responsibility, FERC “oversee[s] all prices for those interstate transactions and all rules and practices affecting such prices.” *FERC v. Electric Power Supply Ass’n*, 577 U.S. 260, 266 (2016). In particular, Congress has charged FERC with ensuring that “[a]ll rates and charges ... and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable” and not “undu[ly] prejudic[ial].” 16 U.S.C. § 824d(a)-(b).

The rates and other terms and conditions governing the transmission and sale of electricity are set forth in “tariffs,” including those filed by certain entities called “regional transmission organizations.” *Morgan Stanley Cap. Grp. Inc. v. Public Util. Dist. No. 1 of Snohomish*

Cnty., 554 U.S. 527, 536-537 (2008). The Federal Power Act requires regional transmission organizations to file “schedules showing all rates and charges for any transmission or sale ... and the classifications, practices, and regulations affecting such rates and charges.” 16 U.S.C. § 824d(c). FERC must publish those proposed rates and regulations. *Id.* Once filed, a regulation relating to rates (here, a tariff) cannot be changed without following notice and comment procedures. *Id.* § 824d(d)-(e).

When a regional transmission organization wants to amend its tariff, it must provide 60 days’ notice to FERC and file a new tariff “stating” the “changes to be made in the schedule” and “the time when” the “changes will go into effect.” 16 U.S.C. § 824d(d). FERC may hold a hearing to determine the lawfulness of the amendments, and the proponent bears the “burden of proof” to show that the change “is just and reasonable.” *Id.* § 824d(e). FERC may adjust rates and related regulations set forth in tariffs, but it may only do so prospectively. *Id.* § 824e(a).

Courts have long interpreted these provisions to restrict retroactive tariff changes. As the D.C. Circuit has explained, FERC “has no authority under the Act to allow retroactive change in the rates” and it may correct unjust and unreasonable rates only “prospectively.” *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1226 (D.C. Cir. 2018); see *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577-578 (1981) (explaining that FERC “has no power to alter a rate retroactively” under analogous provisions of the Natural Gas Act). These “rules mandating the open and transparent filing of rates and broadly proscribing their retroactive adjustment are known collectively as the ‘filed rate doctrine.’” *Old Dominion Elec. Coop.*, 892 F.3d at 1226-1227. As is “clear” from the “statutory terms,” *Oklahoma Gas & Elec. Co. v. FERC*,

11 F.4th 821, 829 (D.C. Cir. 2021), “the filed rate doctrine is not limited to ‘rates’ *per se*,” but extends to matters “directly affect[ing]” rates, *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966-967 (1986), such as “the classifications, practices, and regulations affecting” rates, and related contracts, 16 U.S.C. § 824d(c).

The anti-retroactivity component of the filed rate doctrine is a “bright-line rule” that “advances” “predictability.” *PJM Power Providers*, 96 F.4th at 401-402. “[P]redictability,” in turn, is paramount both “because Congress said so” and because “electricity markets depend on it,” as “[s]table markets depend on stable rules.” *Id.* at 402. In that way, the doctrine promotes the stability and predictability of rules governing the nation’s multi-billion-dollar electricity markets.

C. PJM’s Operation Of Wholesale Capacity Auctions

As noted above, to help FERC oversee electricity markets, “FERC encouraged the creation of nonprofit entities to manage wholesale markets on a regional basis.” *Electric Power Supply*, 577 U.S. at 267. These regional transmission organizations span certain geographic areas and work to maintain a stable supply of electricity across the power grid.

PJM is one such organization. PJM operates in D.C. and 13 States. See FERC, *An Introductory Guide for Participation in PJM Processes* (updated Apr. 11, 2025).¹ Like all regional transmission organizations, PJM “coordinate[s] the interstate electricity market in a specific geographic area.” *Entergy Ark., LLC v. FERC*, 134 F.4th 576, 579 (D.C. Cir. 2025). Its responsibilities

¹ Available at <https://tinyurl.com/2s3e7zxf>.

include “operating the electrical grid, balancing energy supply and demand, establishing markets for the sale and purchase of electricity, and ensuring the reliable transmission of electricity.” *Id.* (cleaned up).

One way in which regional transmission organizations manage energy markets is by operating auctions that “enable [electricity] suppliers to meet demand from the utilities and other ‘load-serving entities’ that buy power at wholesale for retail sale to users.” *XO Energy MA, LP v. FERC*, 77 F.4th 710, 714 (D.C. Cir. 2023); 16 U.S.C. § 824q(a)(2) (defining “load-serving entity”). Regional transmission organizations administer a number of different types of auctions, *see Hughes v. Talen Energy Mktg.*, 578 U.S. 150, 155 (2016), including so-called wholesale capacity auctions.

The PJM wholesale capacity auction at issue here is called a “Base Residual Auction.” As PJM explains it, the auction is designed to “ensure[] long-term grid reliability by securing the appropriate amount of power supply resources needed to meet predicted energy demand in the future.” PJM, *Capacity Market (RPM)*.²

In broad strokes, the auction operates as follows. The goal of the auction is to obtain commitments from energy producers to supply electricity three years in the future. *PJM Interconnection, L.L.C.*, 126 FERC ¶61,275, P120 (2009) (“2009 Order”). That future year is referred to as the “Delivery Year.” During an auction, electricity producers “bid” the price they are willing to accept in exchange for a guarantee to provide electricity in the specified Delivery Year, along with the amount of electricity they guarantee to provide. The amount of

² Available at <https://tinyurl.com/m5wkprrb> (visited Sept. 17, 2026).

promised electricity is called “[c]apacity,” which “represents a commitment of resources to deliver when needed.” PJM Learning Center, *Capacity Market (RPM)*.³ “Capacity is not actual electricity,” but “a commitment to produce electricity or forgo the consumption of electricity.” *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 659 (D.C. Cir. 2017).

During the auction, PJM accepts, or “clears,” all of the bid-in capacity for the lowest bidder’s price, then all of the capacity for the second lowest bidder’s price, and so on, until PJM has filled all forecasted capacity need for the Delivery Year. *See PJM Power Providers*, 96 F.4th at 395. The last bid that clears sets the “clearing price” for the auction, and all offers that cleared the auction receive the same clearing price regardless of their initial bid. *Id.*

Auction participants that have their bids cleared are obligated to provide the promised capacity at the promised time, regardless of changed circumstances. *PJM Power Providers*, 96 F.4th at 395. If a participant fails to meet its promised capacity commitments, it owes PJM a “significant payment for non-performance.” PJM Learning Center, *Capacity Market (RPM)*.⁴

D. FERC And PJM Allow Energy Efficiency Resources Into PJM’s Capacity Auctions

In 2009, PJM proposed revisions to its tariff to allow “energy efficiency resources” to be offered in its wholesale capacity auctions. 2009 Order, 126 FERC ¶61,275, P120. PJM defined energy efficiency resources to

³ Available at <https://tinyurl.com/ms5batab> (visited Sept. 17, 2026).

⁴ *Id.*

include projects to install energy efficient appliances or other equipment designed to reduce “electric energy consumption.” *Id.* P121. Under PJM’s proposal, in addition to accepting bids from traditional electricity generators, PJM would accept bids from energy efficiency resources owners for commitments to reduce energy consumption in the future. *Id.* P120. The proposal reflected the logic that ensuring future electricity supply can be managed by creating financial incentives to produce more energy or to reduce energy consumption. *See id.* PP130-131.

PJM’s proposal responded to a prior determination by FERC that, although PJM did not currently “treat investment in energy efficiency as a type of capacity resource eligible to participate in the capacity market,” it should come up with a plan to do so. *PJM Interconnection, L.L.C.*, 119 FERC ¶61,318, P202 (2007). FERC’s instruction to PJM was clear that, “to the extent possible, energy efficiency solutions should be able to compete on an equal footing with demand response, generation, and transmission solutions.” *Id.*

Unsurprisingly given FERC’s directive to PJM, FERC approved PJM’s tariff revisions and “commend[ed]” PJM on them. 2009 Order, 126 FERC ¶61,275, P130. FERC added “that energy efficiency is a critical part of efficient energy markets, and should be treated comparably to other types of resources, by being allowed to participate in [PJM’s] base residual auctions.” *Id.*

In the wake of these tariff changes, Affirmed began providing energy efficiency resources to PJM’s capacity market starting in 2014, and it participated in nearly 30

PJM capacity auctions. App.233a ¶9.⁵ In a nutshell, Affirmed’s business worked as follows. Affirmed purchased exclusive contractual rights to the energy savings of energy efficient products sold to consumers by its program partners, such as manufacturers, retailers, and distributors (like Home Depot). Affirmed paid program partners per-unit compensation for each unique energy efficient product they sold, then calculated and aggregated the expected future energy capacity reductions from those products, offering those reductions in PJM’s capacity auctions. App.233a ¶7. Through the financial payments Affirmed made to program partners, funded in turn by revenue earned from offering energy efficiency resources in PJM’s capacity auctions, Affirmed’s program provided strong incentives to its partners to increase their sales of energy efficient products.⁶

Energy efficiency resources create capacity value in a different way from traditional generation. A generator generally creates capacity by standing ready to produce

⁵ On July 18, 2026, Affirmed Energy LLC filed for bankruptcy. See Voluntary Petition Under Chapter 11, *In re Affirmed Energy LLC*, No. 26-bk-30969 (Bankr. W.D.N.C. July 18, 2026), Dkt. 1. As a result, the description of Affirmed’s business model is historical only.

⁶ On April 15, 2026, FERC issued a \$1.1 billion penalty order against American Efficient, LLC and affiliated entities, including Affirmed. As FERC has acknowledged, that enforcement action is a “separate proceeding” from FERC’s approval of PJM’s tariff amendments. C.A. FERC Br. 12 n.4. Neither FERC’s approval of PJM’s tariff amendment nor the D.C. Circuit’s analysis of the retroactivity of that amendment turns on the existence of or allegations in the enforcement proceeding. American Efficient emphatically disputes the legal and factual bases of the penalty order, which is itself nonenforceable. 16 U.S.C. § 823b(d)(3)(B). In the event FERC initiates a suit to enforce the order in federal court, American Efficient will challenge the order in those *de novo* proceedings.

electricity in a future Delivery Year. Energy efficiency, by contrast, reduces future demand through investments made upfront—by installing equipment or creating incentives to lower electricity use over multiple years. The value of that investment therefore does not disappear after the first auction year; it continues as the same efficiency measure reduces energy demand in later years.

PJM’s tariff accounted for that unique feature by giving cleared energy efficiency resources a multi-year bidding right. The tariff guaranteed that “[a]n energy efficiency resource that clears an auction for a Delivery Year may be offered in auctions for up to three additional consecutive Delivery Years, but shall not be assured of clearing in any such auction[.]” App.195a. The plain meaning of that provision is obvious. As FERC explained in approving it, this guarantee “allow[s] an [energy efficiency] resource to bid into the auction, and if it is accepted, to bid for an additional three consecutive years.” 2009 Order, 126 FERC ¶61,275, P131. FERC made clear that a key purpose of the provision was to ensure market participants investing in energy efficiency resources “have the ability to obtain the full economic benefits of their investments.” *Id.* P137.

E. FERC And PJM Issue The Retroactive Tariff Amendment

For 15 years, PJM’s FERC-approved tariff allowed energy efficiency resources to participate in PJM’s capacity auctions and permitted cleared resources to be offered in up to three additional consecutive auctions. During that period, Affirmed did exactly what the tariff invited. As relevant here, it invested approximately \$50 million in payments and fees to program partners to acquire rights to energy savings, aggregated those savings

into energy efficiency resources, and successfully offered those resources into PJM's capacity auctions. App.234a-235a. For example, Affirmed's resources cleared the PJM auction for the 2023/24 Delivery Year, giving Affirmed the right to offer those resources in auctions through the 2026/27 Delivery Year. App.234a. Other Affirmed resources cleared the PJM auction for the 2024/25 Delivery Year, securing Affirmed the right to offer those resources through the 2027/28 Delivery Year. *Id.*

In 2024, however, PJM and FERC changed course and issued a tariff revision that stripped Affirmed of those vested rights. The revision barred energy efficiency resources from participating in future capacity auctions, beginning with the July 2025 auction. App.192a. As applied to Affirmed, that meant resources that had already cleared under the old tariff—and thus had earned the right to be offered in later auctions—could no longer be bid in the very auctions the prior tariff guaranteed. Affirmed objected that applying the tariff amendment in this way was retroactive because it upset vested rights that had attached before the rule change.

FERC nevertheless approved PJM's tariff revision in 2024, effective for the then-upcoming July 2025 auction. It rejected Affirmed's retroactivity and filed rate doctrine arguments on the ground that the amendment operated only "prospectively." App.108a. FERC reasoned that the prior tariff created only an "expectation," not a "legal right," because, FERC claimed, the prior tariff did not actually guarantee that Affirmed's resources would clear future auctions. *Id.*

F. Proceedings Following FERC's Order

Affirmed moved for a stay and rehearing of the FERC order. FERC denied rehearing by operation of

law in January 2025, App.113a, and issued a rehearing order explaining its decision in February 2025, App.115a-158a.

The rehearing order “modif[ied] the discussion” in the original approval order but “reach[ed] the same result.” App.116a. In the order, FERC again rejected Affirmed’s argument that the tariff was retroactive in violation of the filed rate doctrine and reaffirmed its view that the change was “wholly prospective[.]” App.146a.

Affirmed petitioned for review of FERC’s orders before the D.C. Circuit.⁷ As relevant here, citing this Court’s decisions in *Landgraf* and *Chew Heong*, Affirmed argued that FERC’s orders were impermissibly retroactive because, with respect to energy efficiency resources that cleared past PJM auctions, they revoked a vested tariff-based right Affirmed had acquired before FERC’s rule change.⁸

⁷ Affirmed initially sought a stay of FERC’s orders pending review. Affirmed explained that it would face irreparable injury should PJM’s July 2025 auction proceed without a stay because Affirmed would “forever lose the ability to attempt to secure revenue on a \$50 million investment in energy efficiency resources.” C.A. Affirmed Mot. to Stay 3 (Mar. 13, 2025), Doc.2105587. In response, FERC and PJM unambiguously stated that Affirmed faced no irreparable injury because compensatory relief would be later available to Affirmed with respect to cleared resources even if PJM auctions went forward while the FERC orders remained subject to judicial review. C.A. FERC Stay Opp. 23 (Mar. 31, 2025), Doc.2108580; C.A. PJM Stay Opp. 17-18 (Mar. 31, 2025), Doc.2108610. Based on those representations, Affirmed withdrew its stay motion and proceeded to merits briefing.

⁸ Affirmed also argued that the tariff amendment’s prospective application was arbitrary and capricious for various reasons. Affirmed does not seek certiorari with respect to those issues.

A divided panel denied Affirmed’s petition. The majority acknowledged that, under the tariff’s plain meaning, Affirmed had obtained permission to bid the already-cleared resources in future auctions. App.14a. But the majority nevertheless held that FERC’s orders were not retroactive because “all they did” was “alter[] ... a ‘future effect.’” App.18a. Notably, although the majority cited *Landgraf*, it failed to meaningfully apply it. And the majority failed to cite, much less distinguish, *Chew Heong*, despite Affirmed’s reliance on that precedent. In the majority’s view, FERC’s orders were prospective because they did not disturb Affirmed’s past auction eligibility, require Affirmed to return payments already received, or render past conduct unlawful. App.18a-19a.

Judge Pan dissented. Applying *Landgraf*’s governing standard, Judge Pan reasoned that the PJM tariff amendment “‘t[ook] away or impair[ed]’ Affirmed’s ‘vested right’ to bid in subsequent auctions” and thus was “impermissibly retroactive” “to the extent that it strip[ped] Affirmed of its entitlement to bid” already-cleared energy efficiency resources in future PJM auctions. App.42a.

Affirmed petitioned for rehearing en banc. After calling for a response, the court denied the petition.

REASONS FOR GRANTING THE PETITION

This Court’s review is warranted for at least three reasons. First, the D.C. Circuit’s divided panel decision creates a split with the Third Circuit in a highly analogous case, also involving PJM. *See PJM Power Providers Grp. v. FERC*, 96 F.4th 390, 399-401 (3d Cir. 2024). Only this Court can resolve this conflict on the application of the filed rate doctrine and help reestablish

consistent, uniform rules for the Nation’s multi-billion-dollar electricity markets. Uniformity is especially important given that PJM spans multiple regional circuits, including the D.C. Circuit and the Third Circuit. As matters now stand, the outcome of future tariff retroactivity challenges under the filed rate doctrine is Circuit-dependent.

Second, the decision below decides an important question of federal law in a way that conflicts with multiple decisions of this Court. The D.C. Circuit’s “future effect” test enables governmental actions to evade retroactivity restrictions, clashing with *Chew Heong v. United States*, 112 U.S. 536 (1884), and *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), which implicitly reject that standard.

Third, more broadly, the D.C. Circuit’s “future effect” test is a symptom of widespread confusion in lower courts regarding the test for retroactivity, a question that has far-reaching consequences across a range of contexts beyond FERC. This case is an appropriate vehicle to resolve the disunity and confusion on this recurring, consequential legal question.

I. THE DECISION BELOW CREATES A CONFLICT WITH THE THIRD CIRCUIT

This case presents a genuine circuit split over the application of FERC’s filed rate doctrine as it relates to analogous changes to a tariff governing the same auction process for the same regional transmission organization—whose operations span the D.C. Circuit and Third Circuit. In *PJM Power Providers*, the Third Circuit applied *Landgraf* to hold that a PJM tariff amendment was retroactive when it nullified a legal consequence fixed by a completed event, even though that amendment altered future events—namely, the outcome of an ongoing

auction. 96 F.4th at 399-401. In the decision below, the D.C. Circuit took the opposite approach, treating the future timing of Affirmed’s nullified auction rights as dispositive. This split undermines the purpose of the filed rate doctrine to promote stability and predictability in energy markets. Rules governing multi-billion-dollar energy capacity markets cannot and should not turn on which regional court of appeals is reviewing the case. Only this Court can reestablish uniformity.

In *PJM Power Providers*, the Third Circuit vacated a FERC order approving a PJM tariff amendment on the ground that it was retroactive as applied to a then-ongoing auction. 96 F.4th at 400. PJM had posted a critical auction parameter—known as an “LDA Reliability Requirement”—prior to a December 2022 auction, as the tariff required. *Id.* at 395.⁹ After PJM received bids but before PJM calculated auction results, *see id.* 401 n.8, PJM discovered a faulty assumption with the LDA Reliability Requirement in a particular region. *Id.* at 396. PJM halted the auction, filed a tariff amendment with FERC to allow it “to adjust[] the LDA Reliability Requirement downward,” and it then sought to apply the new amendment to the ongoing December 2022 auction. *Id.* FERC approved the tariff amendment, rejecting objections that the amendment was retroactive on the ground that nothing in the tariff prevented PJM from “prospectively updating” the requirement for purposes of the uncompleted auction. *Id.* at 397.

Before the Third Circuit, FERC defended that order in substantially the same manner as it did here.

⁹ The LDA Reliability Requirement is “the amount of capacity that must be produced to meet peak demand, including a reserve margin,” for a zone within PJM. *PJM Power Providers*, 96 F.4th at 395.

FERC argued, for example, that PJM’s tariff amendment was “prospective because it did not alter the past legal consequences of past actions.” FERC Br. 27, *PJM Power Providers Grp. v. FERC*, No. 23-1778 (3d Cir. Dec. 18, 2023), Dkt. 101 (“FERC CA3 Br.”); *compare* C.A. FERC Br. 48 (agency actions that alter “only the *future* legal consequences of past actions” are not retroactive). Additionally, FERC claimed, again echoing its position here, that a tariff amendment that merely “upsets expectations” based on an existing tariff is not retroactive. FERC CA3 Br. 31; *compare* C.A. FERC Br. 61 (making a similar argument).

Unlike the D.C. Circuit, the Third Circuit rejected FERC’s restricted view of retroactivity. Applying *Landgraf*, the Third Circuit held that PJM’s posting of the original LDA Reliability Requirement (a past action) triggered a tariff-based obligation (a legal consequence) to use that requirement in the upcoming auction (future effect). *PJM Power Providers*, 96 F.4th at 400. Because the tariff amendment “permitted PJM to use a different LDA Reliability Requirement” after it had received bids, it “altered the legal consequence attached to PJM’s calculation and posting of the LDA Reliability Requirement” and “[f]or that reason, it [was] retroactive.” *Id.*

The same reasoning would have led to a different outcome here. Just as PJM’s posting of the LDA Reliability Requirement “carried a legal consequence” under the then-existing tariff, *PJM Power Providers*, 96 F.4th at 400, Affirmed’s clearing of prior auctions triggered a tariff-based right for cleared resources to participate in a fixed number of future auctions. It did not matter to the Third Circuit’s analysis that the tariff amendment had future effect in the sense that the relevant auction was not completed; what mattered was that the amendment “nullified a legal consequence attached to a past

action.” *Id.* at 401. Under the Third Circuit’s approach, and contrary to the D.C. Circuit, the fact that a divested right concerned ongoing or future capacity auctions does not mean the change is prospective, rather than retroactive, under *Landgraf*.

The divergent approaches taken by the D.C. Circuit and Third Circuit call for this Court’s review. Uniform rules for retroactivity in FERC tariff cases are essential to the nation’s electricity markets. “[P]redictability is important because electricity markets depend on it.” *PJM Power Providers*, 96 F.4th at 402. “Stable markets depend on stable rules.” *Id.* And “uncertainties regarding rate stability and contract sanctity” can have a “chilling effect on investments.” *NRG Power Mktg., LLC v. Maine Pub. Utils. Comm’n*, 558 U.S. 165, 174 (2010) (quotation marks omitted). Allowing the filed rate doctrine’s ban on retroactivity to have a different meaning depending on the regional circuit in which review is sought “would undermine the congressional scheme of uniform rate regulation” and inject unpredictability into energy markets. *Arkansas La. Gas*, 453 U.S. at 579.

That concern is particularly acute because PJM’s tariff governs energy rates across multiple regional circuits: the D.C. Circuit, Third Circuit, Fourth Circuit, Sixth Circuit, and Seventh Circuit. *See supra* p.7 & n.1. Inconsistent approaches risk disruption and confusion within this multi-billion-dollar market.¹⁰ Now, express

¹⁰ For PJM’s December 2025 wholesale capacity auction, the value of the clearing price multiplied by the cleared supply equaled \$16.4 billion. *See* PJM Inside Lines, *PJM Auction Procures 134,479 MW of Generation Resources* (Dec. 17, 2025), <https://insidelines.pjm.com/pjm-auction-procures-134479-mw-of-generation-resources>.

tariff-backed grants of vested future rights to market participants will be binding only if the market participant can sue in the right venue. And the next time FERC wishes to promote investment in a particular sector by promising market participants a valuable right, companies will think twice before they take up the offer.

The uncertainty generated by this division of authority is not limited to wholesale capacity auctions—or even to FERC cases. As the majority recognized below, courts “apply the filed rate doctrine ‘across the spectrum of regulated utilities,’” and retroactivity cases in the FERC context are readily transferable to other rate-making contexts. App.18a n.3.

II. THE DECISION BELOW CONFLICTS WITH MULTIPLE PRECEDENTS OF THIS COURT

Certiorari is independently warranted because the decision below “decide[s] an important federal question in a way that conflicts with relevant decisions of this Court.” S. Ct. R. 10(c). That conflict is stark. At least twice—in *Landgraf* and *Chew Heong*—this Court has made clear that a legal change is retroactive when it revokes a right to take a future action that vested upon a completed past event, even if the party has not yet exercised that right.

In *Landgraf*, this Court held that a legal change is retroactive if it “attaches new legal consequences to events completed before its enactment” or if it “takes away or impairs a vested right acquired under existing laws.” 511 U.S. at 269-270. *Landgraf* explained that the test for retroactivity does not apply just to laws “enacted to take effect from a time anterior to their passage.” *Id.* It embraces “all” legal changes that “affect vested rights and past transactions.” *Id.* at 269 (quotation marks omitted).

To illustrate that point, *Landgraf* invoked *Chew Heong v. United States*, 112 U.S. 536 (1884), a “path-marking decision” on retroactivity, *Vartelas v. Holder*, 566 U.S. 257, 268 (2012). In *Chew Heong*, the Court refused to interpret the “Chinese Restriction Act” to bar the reentry of a noncitizen laborer who had left the country when existing law allowed him to return freely, but who lacked a certificate that an intervening law made a condition of reentry. Applying the law to him, the Court explained, would impermissibly give the statute “retrospective operation” because “rights previously vested” would be “injuriously affected.” 112 U.S. at 559. Retroactivity thus turned on *whether* a vested right would be injuriously affected—not *when* that right would be exercised.

The governing legal test for retroactivity should have made this an easy case. For 15 years, PJM’s FERC-approved tariff rules guaranteed that “[a]n energy [e]fficiency [r]esource that clears [a PJM capacity] auction” for a single delivery year “may be offered in auctions for up to three additional consecutive” delivery years. App.195a ¶4. Affirmed reasonably relied on that guarantee, investing substantial sums to develop and then bid energy efficiency resources into past PJM auctions. When those resources cleared, Affirmed secured valuable and vested rights to offer them in up to three more auctions. The 2024 tariff amendment that FERC approved stripped those resources of the very future-participation rights the prior tariff promised. Basic intuitions of fairness, as well as common sense, suggest that when the government pulls the rug out from under a party in this way it acts retroactively. And under *Landgraf* and *Chew Heong*, FERC’s actions here plainly were: divesting a party of a future entitlement earned

through a completed past act, secured at considerable expense, is paradigmatic retroactivity.

The D.C. Circuit, however, refused to hold FERC's orders retroactive on the ground that "all they did" was "alter[] ... a 'future effect.'" App.18a. Applying D.C. Circuit precedent, the panel discerned a rule that a legal change is "purely prospective" if it "alters the future effect' but 'not the past legal consequences of an action.'" App.17a-18a (quoting *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006)). That "future effect" test for exempting legal changes from retroactivity constraints clashes with this Court's precedents.

Start with *Landgraf*. There, Justice Scalia, concurring in the judgment, advocated a narrow retroactivity standard that elevated timing to dispositive status. He disagreed with the majority's assessment of "the meaning of retroactivity." 511 U.S. at 290 (Scalia, J., concurring in the judgment). In his view, "[t]he critical issue ... is not whether the rule affects 'vested rights.'" *Id.* at 291 (Scalia, J., concurring in the judgment). Instead, a court should assess what "relevant activity" is regulated by a legal change. *Id.* If that activity "occurs *after* the effective date" of the changed law, the change is not retroactive. *Id.* That was effectively the view he had advanced years earlier in a solo concurrence in *Bowen v. Georgetown University Hospital* (arguing that primary retroactivity means "altering the *past* legal consequences of past actions"). 488 U.S. 204, 219 (1988) (Scalia, J., concurring).

The *Landgraf* majority did not adopt that temporally focused test. It instead reaffirmed that a legal change is retroactive either if it "attaches new legal consequences to events completed before its enactment" or "impair[s] rights a party possessed when he acted."

511 U.S. at 269-272. As support, the majority pointed to Justice Story’s “influential definition” of retroactivity in *Society for Propagation of the Gospel v. Wheeler*, in which he explained that the rule against retroactivity does not simply bar “statutes ... enacted to take effect from a time anterior to their passage,” but instead “embrace[s] ‘all statutes, which, though operating only from their passage, affect vested rights and past transactions.’” *Id.* at 268-269 (quoting 22 F. Cas. 756, 767 (C.C.N.H. 1814) (No. 13,156) (Story, J., Circuit Justice)). In the majority’s view, then, a legal change can be retroactive not only when it undoes a completed past transaction, but also when it strips a party of future entitlements that the law guaranteed on account of a past event—such as the ability to reenter the country freely after departing under prior law.

The D.C. Circuit below did not apply that controlling standard. Instead, it invoked its own formulation—drawn from *Mobile Relay*, 457 F.3d at 11—that an agency “order ... [that] alters the future effect, but not the past legal consequences of an action ... is not retroactive.” App.17a-18a (quotation marks omitted). Tellingly, *Mobile Relay* did not cite *Landgraf*. It instead invoked Justice Scalia’s formulation that “[r]etroactive rules ‘alter[] the *past* legal consequences of past actions.’” 457 F.3d at 11 (quoting *Bowen*, 488 U.S. at 219 (Scalia, J., concurring)). The panel thus resolved the retroactivity question by passing over this Court’s precedent and applying a standard advanced only in concurrences—one that this Court has never embraced and that is inconsistent with the framework this Court did adopt. Elevation of a rejected concurrence into a governing legal rule is the type of conflict with this Court’s decisions that warrants certiorari under Rule 10(c).

Compounding the problem, the majority ignored the concept of vested rights, a conspicuous omission in light of the dissent’s emphasis on that concept.¹¹ As Judge Pan explained, when Affirmed’s resources cleared, it received a “vested entitlement to bid the continued energy savings” in future auctions, and “FERC’s approval of PJM’s 2024 tariff amendment ... deprives Affirmed of [that] vested right.” App.50a-51a (dissenting op.).

That assessment is well-grounded in this Court’s precedents. In *Pearsall v. Great Northern Railway Co.*, for example, this Court explained that a “vested right” is “an immediate, fixed right of present or future enjoyment” or “a present, fixed right of future enjoyment.” 161 U.S. 646, 673 (1896) (quotation marks omitted). The Court reaffirmed that definition in *Fernandez-Vargas v. Gonzales*, and added that a “vested right” is distinguished from a “contingent” right by the fact that a vested-right holder “t[ook] some action that ... elevate[d] [the right] above the level of hope” or “enhanced [the right’s] significance to him in particular.” 548 U.S. 30, 44 n.10 (2006).

Those definitions describe Affirmed’s right to participate in future auctions to a tee. Affirmed’s right to participate was “an immediate, fixed right of ... future enjoyment.” When its resources cleared prior PJM auctions, Affirmed “immediate[ly]” acquired a “right” under the tariff to offer those resources in a “fixed” number of “future” auctions. That right, moreover, was not “contingent” on uncertain future events but instead had “vested” because Affirmed “t[ook] action” (bidding the

¹¹ The majority recited *Landgraf*’s governing tests but did not engage with or otherwise apply them, relying instead on D.C. Circuit precedent based on Justice Scalia’s *Bowen* concurrence, not *Landgraf*. App.13a-14a.

resources at a clearing price) that “elevated” the option to offer those resources in future auctions “above the level of hope” and “enhanc[ed]” the tariff language’s “significance” into a guarantee “to [Affirmed] in particular.” *Fernandez-Vargas*, 548 U.S. at 44 n.10. By revoking that guarantee, FERC’s orders impaired Affirmed’s vested right. The majority’s failure to grapple with that point underscores its departure from the retroactivity test this Court has embraced.

In sum, the conflict between the panel’s decision and this Court’s precedents is direct and outcome determinative. The panel applied a retroactivity test that this Court declined to adopt in *Landgraf*—and one irreconcilable with the vested-rights analysis the *Landgraf* majority did embrace. *Chew Heong*, moreover, confirms that the governing retroactivity standard reaches the impairment of future entitlements fixed by a completed past act. Certiorari is warranted to align the D.C. Circuit’s retroactivity test with this Court’s precedents.

III. THE PROPER LEGAL TEST FOR RETROACTIVITY IS AN IMPORTANT, RECURRING ISSUE THAT HAS LONG CONFUSED LOWER FEDERAL COURTS

This Court’s review is also warranted because this case presents an important recurring question that has broadly confused federal courts: whether a legal change that attaches new legal consequences to a completed event escapes retroactivity limits simply because those consequences operate only in the future. The answer to that question affects how courts apply *Landgraf* across virtually every field of law, from financial regulation and taxation to immigration and criminal sentencing, and it helps determine the stability of the multi-billion-dollar electricity markets that FERC-approved tariffs govern.

But federal courts are increasingly confused by, and openly divided on, this question.

A. The Decision Below Illustrates And Deepens Confusion In Federal Courts On The Proper Legal Test For Retroactivity

This Court’s review is needed to resolve confusion in the lower courts about whether legal changes that impose disabilities on the exercise of future rights can ever be retroactive. Despite *Landgraf*’s broader test, multiple courts of appeals have joined the D.C. Circuit in invoking Justice Scalia’s formulation in his *Bowen* concurrence—which *Landgraf* declined to embrace—as relevant to the governing standard. See *In re FCC 11-161*, 753 F.3d 1015, 1072 (10th Cir. 2014) (quoting *Mobile Relay*, 457 F.3d at 11); *Media Servs., Inc. v. Peterson*, 51 F. App’x 207, 208 (9th Cir. 2002) (“[R]ules that ... ‘affect[] the future legal consequences of past transactions’ are not retroactive.” (quoting *National Med. Enters., Inc. v. Sullivan*, 957 F.2d 664, 671 (9th Cir. 1992))); see also *Solar Energy Indus. Ass’n v. FERC*, 80 F.4th 956, 981 (9th Cir. 2023) (quoting *Bowen*, 488 U.S. at 219 (Scalia, J., concurring)); *Sunshine State Reg’l Ctr., Inc. v. Director, U.S. Citizenship & Immigr. Servs.*, 143 F.4th 1331, 1346 n.7 (11th Cir. 2025) (same).

The past/future effect distinction that decisions of the Ninth, Tenth, Eleventh, and D.C. Circuits have drawn is in significant tension, if not outright conflict, with decisions of several courts of appeals (including within the Ninth and Eleventh Circuits) that have held that deprivations of the opportunity to obtain future discretionary relief are retroactive. For example, the Seventh Circuit held in *Jeudy v. Holder* that a rule removing a noncitizen’s prior eligibility for discretionary relief from removal—which the noncitizen had not yet

exercised but had acquired before the law’s enactment—was impermissibly retroactive. 768 F.3d 595, 603-605 (7th Cir. 2014). And the First Circuit held in *Arevalo v. Ashcroft* that an illegal reentrant who had applied for, but not received a decision on, discretionary relief from removal before a law change removed that form of relief, nevertheless had “a vested right in [that] form of relief,” making the revocation of her application “unfairly retroactive.” 344 F.3d 1, 15 (1st Cir. 2003).

Evidencing deep doctrinal confusion, panels in the Ninth and Eleventh Circuits have at times followed this approach, despite invoking a “future effect” standard in other cases, as described above. For example, the Ninth Circuit has held that the revocation of an application for discretionary relief was a retroactive “cancellation of vested rights” where the noncitizen “affirmatively took pre-enactment action so as to change his legal status” and thus made his “expectation of relief ... a ‘vested’ right that could not be ‘impair[ed].’” *Ortega v. Holder*, 747 F.3d 1133, 1134 (9th Cir. 2014) (discussing *Ixcot v. Holder*, 646 F.3d 1202, 1212-1213 (9th Cir. 2011)). And the Eleventh Circuit held in *Rendon v. United States Attorney General*, that a rule denying the “future availability of discretionary relief” had “impermissible retroactive ... effect” because it “attache[d] new legal consequences to events completed before its enactment.” 972 F.3d 1252, 1263 (11th Cir. 2020) (quotation marks omitted).

Many of these latter decisions follow from or apply this Court’s decision in *Vartelas*, which in turn relied on *Chew Heong* for the proposition that an intervening legal change impairing a future right tied to a completed past act is retroactive. 566 U.S. at 268 (quoting *Chew Heong*, 112 U.S. at 559). Arising in a variety of contexts, those decisions reflect the same basic doctrinal point

that should govern here: a legal change can be retroactive even if the impaired benefit would have been exercised only in the future, so long as that entitlement arose from past conduct under then-existing law.

The confusion in lower courts on this issue is deep, longstanding, and consequential. Only this Court can definitively resolve which test governs.

B. The Proper Legal Test For Retroactivity Is An Important, Recurring Question

It is difficult to overstate the importance of a proper test for retroactivity, as it implicates nearly every area of law. As discussed above, it is critical in the FERC context because the filed rate doctrine limits retroactive tariff changes. But the test for retroactivity is also vitally important across the full span of the administrative state because the rulemaking authority of every federal agency is circumscribed by the principle that “rulemaking authority will not ... be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.” *Bowen*, 488 U.S. at 208. Courts cannot apply those limits coherently and consistently without a reliable test for determining when a legal change is retroactive in the first place.

Courts regularly apply *Landgraf* in nearly every context where statutes or regulations affect the conduct of private individuals and entities, including cases about financial regulation, *Murphy v. FDIC*, 38 F.3d 1490, 1501 (9th Cir. 1994); tax law, *City of N.Y. v. Permanent Mission of India to United Nations*, 618 F.3d 172, 192-200 (2d Cir. 2010); intellectual property law, *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Department of Treasury*, 638 F.3d 794 (D.C. Cir. 2011); FCC regulations, *BellSouth Telecomms., Inc. v. Southeast Telephone Inc.*, 462 F.3d 650 (6th Cir. 2006);

the Freedom of Information Act, *Southwest Ctr. for Biological Diversity v. U.S. Department of Agriculture*, 314 F.3d 1060, 1061-1062 (9th Cir. 2002); private rights of action, *Gordon v. Pete’s Auto Serv. of Denbigh, Inc.*, 637 F.3d 454, 458-461 (4th Cir. 2011); real estate contracts, *Trostel v. American Life & Cas. Ins. Co.*, 133 F.3d 679, 681 (8th Cir. 1998); immigration, *Valdez-Sanchez v. Gonzales*, 485 F.3d 1084 (10th Cir. 2007); and criminal law, *Hughes v. United States*, 770 F.3d 814 (9th Cir. 2014).

The D.C. Circuit’s cramped view of retroactivity thus has consequences well beyond the specific FERC context presented here. Although this dispute involves the filed rate doctrine, the Federal Power Act does not define retroactivity, and the meaning of retroactivity in the filed rate context is guided by general retroactivity principles. *See PJM Power Providers*, 96 F.4th at 398. As proof of that, the panel majority’s analysis expressly drew from retroactivity principles embodied in cases outside the FERC context, *see* App.17a, and the narrow “future effect” test it drew from those precedents is by no means limited to the Federal Power Act.

The likely practical consequences of the decision, moreover, are especially significant because other courts of appeals—including the Fifth, Ninth, Tenth and Federal Circuits—regularly look to the D.C. Circuit’s precedent for guidance on retroactivity. *See, e.g., Jones v. O’Malley*, 107 F.4th 489, 494-495 (5th Cir. 2024) (applying *Cox v. Kijakazi*, 77 F.4th 983 (D.C. Cir. 2023)); *Solar Energy Indus. Ass’n*, 80 F.4th at 981 (citing *National Mining Ass’n v. Department of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002)); *FCC 11-161*, 753 F.3d at 1072 (quoting *Arkema, Inc. v. EPA*, 618 F.3d 1, 7 (D.C. Cir. 2010)); and *Mobile Relay*, 457 F.3d at 11); *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1363 (Fed. Cir. 2005)

(citing *Marrie v. SEC*, 374 F.3d 1196, 1206-1209 (D.C. Cir. 2004); and quoting *Health Ins. Ass’n of Am., Inc. v. Shalala*, 23 F.3d 412, 423-424 (D.C. Cir. 1994)). Unless corrected by this Court, the D.C. Circuit’s “future effect” standard is sure to influence courts in other settings, affording agencies and legislatures undue license to accomplish retroactive changes—a “disfavored” outcome that clashes with “fundamental notions of justice that have been recognized throughout history.” *Eastern Enters. v. Apfel*, 524 U.S. 498, 532 (1998) (plurality) (cleaned up).

IV. THIS CASE IS AN APPROPRIATE VEHICLE TO DECIDE THE LEGAL TEST FOR RETROACTIVITY

Finally, this case is a good vehicle to clarify the governing retroactivity test. The question is purely legal, and there are no factual disputes material to its resolution. There are also no waiver or forfeiture concerns, as Affirmed pressed its retroactivity argument before FERC on rehearing and before the D.C. Circuit. Affirmed specifically preserved its arguments about the incompatibility of the “future effect” test with *Landgraf* and *Chew Heong*. In addition, although the parties disputed the meaning of the tariff provision below, both the majority and dissent agreed on a proper interpretation of PJM’s tariff—that it secured permission for Affirmed to offer energy efficiency resources that cleared one auction in up to three more auctions. *See* App.14a, 43a. The Court can thus take the tariff’s meaning as a given for purposes of review.

There are no jurisdictional barriers to review. Although the PJM auctions at which Affirmed should have been entitled to bid cleared resources have come and gone, both FERC and PJM have confirmed that Affirmed can be made whole by PJM paying Affirmed what

it would have been owed had it participated in a completed auction. *See* C.A. Affirmed Opening Br. 25-26; *supra* p.14 n.7. The availability of retrospective monetary relief ensures that a live controversy remains. Moreover, although Affirmed subsequently entered bankruptcy, any resources owed to Affirmed would be paid to the bankruptcy estate. *See* 11 U.S.C. § 541(a).

Finally, nothing about a separate pending and non-enforceable penalty order imposed by FERC on Affirmed after the FERC orders challenged here bears on the question presented. *See supra* p.11 n.6. Neither FERC's nor the D.C. Circuit's retroactivity analysis had anything to do with the legal or factual questions presented by that separate enforcement proceeding. The outcome of that proceeding is irrelevant to the outcome of this case, and vice versa. It provides no obstacle to this Court's resolution of the important question presented here.

CONCLUSION

Respectfully, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2026