No. 19-257

In the Supreme Court of the United States

CALIFORNIA TROUT, ET AL., PETITIONERS,

v.

HOOPA VALLEY TRIBE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a State can indefinitely avoid "waiv[ing]" its "period of time" to review a "request for certification" under Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1), by requiring the regulated party to withdraw-and-resubmit the same certification request before the statutory one-year maximum for the State's review expires.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent-Intervenor PacifiCorp states that all outstanding shares of PacifiCorp's common stock are held indirectly by Berkshire Hathaway Energy Company, which is a direct subsidiary of Berkshire Hathaway, Inc. The shares of Berkshire Hathaway, Inc. are publicly traded on the New York Stock Exchange. None of the intermediary companies holding PacifiCorp's stock are publicly held.

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INTRODUCTION

Before the Federal Energy Regulatory Commission ("FERC") may issue a federal hydropower license, the State in which any discharge into navigable waters originates has a "reasonable period of time (which shall not exceed one year)" to decide whether to issue a water-quality certification. 33 U.S.C. § 1341(a)(1). If the State does not act on a water-quality certification "request" within that time period, the State "waive[s]" its statutory right, and the decision of whether to issue the hydropower license proceeds to FERC.

In an effort to extend the statutory timeline for certification, some States require applicants to withdraw certification requests before the waiver deadline and then to resubmit identical applications, year after year, thereby purporting to restart the one-year clock for reviewing the request. In a unanimous opinion by Judge Sentelle, joined by Judges Griffith and Pillard, the D.C. Circuit became the first court to address the legality of this withdrawal-and-resubmission mechanism, holding that this technique could not extend a State's authority to issue a certification beyond the statutory one-year deadline.

Petitioners now ask this Court to review the D.C. Circuit's splitless decision but offer no persuasive grounds for this Court to do so. Most importantly, while Petitioners allege a circuit split, an examination of the cases that they cite demonstrates that no other

court has decided this issue. Further percolation is thus plainly warranted, and this is *especially* true if Petitioners and their *amici* are correct about the practical importance of this issue. While Petitioners worry that allowing the issue to percolate will threaten water quality because States have become reliant on this withdrawal-and-resubmission mechanism, both the States and FERC retain ample tools to protect water quality. And although PacifiCorp took no position on the legal effect of this mechanism during the briefing before the panel, upon review of the D.C. Circuit's well-reasoned opinion, the court's textual analysis appears to be sound.

Finally, PacifiCorp wishes to emphasize its deep and ongoing commitment to the successful implementation of the settlement agreement that resolves the hydroelectric relicensing proceeding at issue in this case. No party or *amicus* before the D.C. Circuit even hinted that the withdrawal-and-resubmittal issue will impact the implementation of the Klamath Hydroelectric Settlement Agreement, either during the merits stage or the *en banc* petition stage. And, in fact, the parties to the settlement, including PacifiCorp, are continuing to engage with FERC to fulfill their responsibilities under this publicly beneficial Agreement.

This Court should deny the Petition.

STATEMENT

A. Under the Federal Power Act ("FPA"), 16 U.S.C. § 791a *et seq.*, FERC has authority to "issue licenses . . . for the purpose of constructing, operating, and maintaining" hydropower projects on navigable waters, *id.* § 797(e); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 373 (2006); Pet. App. 4a. Under Section 401 of the Clean Water Act, FERC may not grant a hydropower license unless the applicant first obtains a water-quality "certification" from the State in which any "discharge" from the hydropower project "originates," or the State waives its statutory right either affirmatively or by lack of timely action. 33 U.S.C. § 1341(a)(1); 86 Stat. 877 (1976); *S.D. Warren*, 547 U.S. at 373–74; Pet. App. 4a, 23a.

Most relevant here, Section 401 provides that the State "waive[s]" its authority to issue a Section 401 certification, thereby permitting FERC to move forward with considering the hydropower license, "[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." § 1341(a)(1); *see* 18 C.F.R. § 4.34(b)(5)(iii). When a State waives its Section 401 certification authority, FERC may then proceed to process the applicant's hydropower license application. *See* § 1341(a); *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 700 (D.C. Cir. 2017).

B. The Klamath Hydroelectric Project ("Klamath Project") comprises seven hydroelectric developments and one non-energy-generating dam, all "located principally on the Klamath River in Klamath County, Oregon and Siskiyou County, California." Pet. App. 22a; *see* Pet. App. 5a. PacifiCorp operates the Klamath Project. Pet. App. 5a. The predecessor to FERC, the Federal Power Commission, issued the original 50-year license for the Klamath Project to PacifiCorp's predecessor in 1954. Pet. App. 5a, 22a.

In 2004, with the Klamath Project's original license set to expire in 2006, PacifiCorp applied for a new license with FERC. This application proposed to relicense most of the Klamath Project's developments and remove (*i.e.*, "decommission") the others. *See* Pet. App. 5a, 22a. PacifiCorp's application to FERC met "[a]ll milestones for relicensing"—including FERC's preparation of its "Final Environmental Impact Statement," which recommended relicensing with additional "environmental measures"—"except" for the requirement of obtaining Oregon's and California's Section 401 water-quality certifications. Pet. App. 5a, 22a. Because the Klamath Project may result in "discharge" in both Oregon and California, both States must issue a Section 401 certification, or waive such authority, before FERC may issue a new license for the Klamath Project. Pet. App. 24a. PacifiCorp's 2004 relicense application is still pending before FERC. *See* Pet. App. 4a–5a.

PacifiCorp has continued to operate the Klamath Project since its original license expired in 2006, under "annual interim licenses" from FERC. Pet. App. 4a–5a; *see* 16 U.S.C. § 808(a)(1). These annual licenses maintain the same "terms and conditions" as the original, now-expired license, *id.* § 808(a)(1), and PacifiCorp has voluntarily adopted interim environmental measures to enhance fish habitat and water-quality conditions while its relicensing application is pending before FERC, Pet. App. 5a.

PacifiCorp filed its Section 401 water-quality certification applications with California and Oregon in 2006. Pet. App. 11a. Between that year and 2014, PacifiCorp "withdr[ew] and refiled its application[s] eight times," annually submitting to both California and Oregon a typically "one-page letter," "indicating withdrawal of its water quality certification request and resubmission of the very same." Pet. App. 11a–12a, 24a (emphasis removed). Since 2010, PacifiCorp took these withdrawal-and-resubmission actions consistent with the express terms of the 2010 Klamath Hydroelectric Settlement Agreement ("Agreement"), a settlement of PacifiCorp's relicensing application between Oregon and California, PacifiCorp, the United States Departments of the Interior and of Commerce, and other parties. Pet. App. 12a, 24a; Agreement pp. 42, 68, 75–76, D.C. Cir. JA 383, 409, 416–17, *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019) (No. 14-1271), Dkt. 1570536 (hereinafter "D.C. Cir.

JA").[1] In the letters it delivered each year under the Agreement, PacifiCorp noted that its withdrawal-and-resubmission was "require[d]" by the Agreement. *See* Pet. App. 24a. In 2015, after FERC entered its decision in the proceedings below, *see infra* pp. 9–10, PacifiCorp again sent a withdrawal-and-resubmission letter to both California and Oregon under the Agreement.[2]

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[1] The parties to the Agreement are "the Governors of the States of California and Oregon; PacifiCorp; the U.S. Department of the Interior; the Department of Commerce's National Marine Fisheries Service; several Indian tribes (not including the Hoopa Tribe); and a number of local counties, irrigators, and conservation and fishing groups," including Petitioners. Pet. App. 22a–23a; Agreement pp. 68–76, D.C. Cir. JA 409–17. The section of the Agreement purporting to "defer" California's and Oregon's Section 401 waiver period provides as follows: "the Parties . . . will request to [California and Oregon] that permitting and environmental review for [the Klamath Project] licensing activities, including . . . water quality certification under Section 401 . . . will be held in abeyance . . . . PacifiCorp shall withdraw and re-file its applications for Section 401 certification as necessary to avoid the certifications being deemed waived under the [Clean Water Act] during the interim period." Pet. App. 5a–6a (quoting Agreement p. 42, D.C. Cir. JA 383).

[2] *See* Correspondence from California State Water Resources Control Bd. to PacifiCorp, Dec. 10, 2015, No. 20151211-5139 (FERC Dec. 11, 2015); Correspondence from PacifiCorp to Oregon Dep't of Environ. Quality, Nov. 10, 2015, No. 20151203-5180 (FERC Dec. 3, 2015); *see also* Brief of the State of Oregon as *Amicus Curiae* Supporting Resp't FERC at

In 2016, FERC granted PacifiCorp's request to hold its relicensing application in abeyance, pending FERC's resolution of PacifiCorp's application to transfer the Klamath Project license for certain licensed developments. *PacifiCorp*, 155 FERC ¶ 61,271, at ¶¶ 6–8 (June 16, 2016).[3] Specifically, PacifiCorp requested that FERC transfer PacifiCorp's license for four of the Klamath Project's seven developments to a third-party dam-removal entity, which entity would potentially remove those four developments under the Agreement's terms. *Id.*; *see infra* p. 8 n.4. FERC has not yet approved PacifiCorp's license-transfer request, thus "PacifiCorp remains the licensee." Pet. App. 6a–7a.

More broadly, the Agreement seeks "to resolve the procedures and the risks" associated with the proposed removal of some of the Klamath Project's developments. Pet. App. 5a. The Agreement contains "a series of interim environmental measures" for PacifiCorp to implement while it remains the licensee pending FERC's consideration of its proposal to transfer part of the license for potential development removal. Pet. App. 5a. These include monitoring Klamath River water-quality, enhancing redband

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10, *Hoopa Valley Tribe*, 913 F.3d 1099 (No. 14-1271), 2015 WL 7755008, at *9.

[3] *See also* Letter filed by FERC pursuant to Fed. R. App. P. 28(j) Advising of Additional Authorities, *Hoopa Valley Tribe*, 913 F.3d 1099 (No. 14-1271), Dkt. 1625832 (submitting this abeyance order to the D.C. Circuit below).

trout spawning habitat, removing an upstream rock barrier that threatened fish passage, taking fish-habitat enhancement measures, making hatchery improvements, and conducting studies in improving in-reservoir water-quality conditions. *See* D.C. Cir. JA 836–47 (updates on status of environmental measures implemented under the Agreement). The Agreement "target[ed] a 2020 decommission date," and PacifiCorp remains committed to the successful transfer of its license and to the removal of developments, consistent with the protections and cost caps provided for in the Agreement. Pet. App. 5a–7a.[4]

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[4] The Agreement conditioned decommissioning of developments on "the securing of federal funds." Pet. App. 6a. In 2014, Senator Wyden introduced Senate Bill 2379 to implement this condition, which Congress did not enact. Pet. App. 23a n.5; *see* Library of Congress, *S.2379 - Klamath Basin Water Recovery and Economic Restoration Act of 2014*, https://www.congress.gov/bill/113th-congress/senate-bill/2379 (last visited Oct. 24, 2019). "Consequently," a "subset" of the parties to the original Agreement entered into an amended agreement creating an alternative plan for potentially removing the four main-stem developments. *See* Pet. App. 6a. This alternative plan would transfer PacifiCorp's license for four of the Klamath Project's seven developments to a third-party dam-removal entity, as referenced above, which entity would be formed for purposes of implementing the Agreement. Pet. App. 6a; *supra* p. 7. Because FERC has not yet approved this license transfer, PacifiCorp "remains the licensee." Pet. App. 6a–7a; *see PacifiCorp*, 162 FERC ¶ 61,236, at ¶¶ 1–2 (Mar. 15, 2018) (deferring this licensing decision); *supra* p. 7.

C. In 2012, the Hoopa Valley Tribe ("Hoopa"), a federally recognized tribe that is not a signatory of the Agreement, petitioned FERC for a declaratory order "find[ing] that PacifiCorp has failed to diligently pursue relicensing" of the Klamath Project and requiring PacifiCorp "to file a plan for decommissioning the project" with FERC. Pet. App. 24a. Alternatively, Hoopa asked FERC to "find that California and Oregon had waived water quality certification" under Section 401 and to "issue a new license" for the Klamath Project without these state certifications. Pet. App. 24a.

FERC denied Hoopa's petition in June 2014 and its request for rehearing in October 2014. Pet. App. 21a, 30a. FERC concluded that it "cannot issue and implement a new license" for the Klamath Project "until water quality certification [under Section 401] has been issued" by California and Oregon. Pet. App. 25a. FERC determined that California and Oregon had not waived Section 401 certification by failing to act within one year on PacifiCorp's application because PacifiCorp had "repeatedly" withdrawn "its applications before a year ha[d] passed." Pet. App. 39a–40a. Despite disagreement with Hoopa about the meaning of Section 401, FERC "agree[d] with the Tribe that the circumstances of this case are far from ideal," and that this "inordinate delay was hardly what Congress contemplated in crafting the one-year certification deadline" in Section 401. Pet. App. 25a, 28a (citations omitted).

D. Hoopa petitioned the D.C. Circuit for review of FERC's denial, and the D.C. Circuit reversed, in a unanimous panel opinion written by Judge Sentelle, joined by Judges Griffith and Pillard. Pet. App. 3a.

The D.C. Circuit explained that "[r]esolution of this case require[d] [it] to answer a single issue: whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year." Pet. App. 10a. Resolving this issue was an "undemanding inquiry because Section 401's text is clear": "The temporal element imposed by the statute is 'within a reasonable period of time,' followed by the conditional parenthetical, '(which shall not exceed one year).'" Pet. App. 10a–11a (quoting § 1341(a)(1)). "Thus . . . a full year is the absolute maximum" for a State to make a decision on a Section 401 application. Pet. App. 11a.

Here, California and Oregon did not act on PacifiCorp's Section 401 requests within one year, meaning that they waived their statutory authority. Pet. App. 11a–12a, 14a. PacifiCorp "first filed" its Section 401 requests with California and Oregon "in 2006." Pet. App. 11a. It then annually withdrew-and-refiled those requests for four years prior to signing the Agreement in 2010, with neither California nor Oregon acting on the requests during this years-long period. *See* Pet. App. 6a, 11a–12a. PacifiCorp then

entered into the Agreement in 2010, which, among other things, purported "to delay water quality certification" by requiring PacifiCorp to continue to withdraw-and-resubmit its requests annually. Pet. App. 10a–12a. PacifiCorp complied with this requirement, withdrawing-and-resubmitting its requests each year under the Agreement. *See* Pet. App. 10a–12a. Every one of PacifiCorp's withdrawn-and-resubmitted "requests" were "not new requests at all"—indeed, the "withdrawal of its water quality certification request and resubmission of the very same" were accomplished "*in the same one-page letter . . . for more than a decade*." Pet. App. 12a (ellipsis in original). Since "[t]he pendency of the requests for state certification in this case has far exceeded the one-year maximum," the court held that "California and Oregon have waived their Section 401 authority with regard to the Project." Pet. App. 11a, 14a.

In reaching its holding, the D.C. Circuit recognized that "the statute's reference 'to act on *a request* for certification'" refers "to a specific request," such that "the period of review for one request [cannot] affect[ ] that of any other request." Pet. App. 11a–12a (quoting § 1341(a)(1)). Here, however, the "record does not indicate that PacifiCorp withdrew its request and submitted a wholly new one in its place." Pet. App. 12a. Rather, the requests "were not new requests at all." Pet. App. 12a. Accordingly, the court did not need to "determine how different a request must be to constitute a 'new request' such that it restarts the one-year clock." Pet.

App. 12a. The "withdrawals-and-resubmissions . . . arrangement does not exploit a statutory loophole; it serves to circumvent a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project." Pet. App. 12a.

Finally, the court distinguished *New York State Department of Environmental Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018), "which suggested, in light of various practical difficulties, that a state could 'request that the applicant withdraw and resubmit the application.'" Pet. App. 13a–14a (quoting *N.Y. State Dep't*, 884 F.3d at 455–56). That "suggestion" was "*dicta*, offered to rebut the state agency's fears that a one-year review period could result in incomplete applications and premature decisions." Pet. App. 14a. And "[w]hile it is the role of the legislature, not the judiciary, to resolve such fears, those trepidations are inapplicable to the instant case" since the "record indicates that PacifiCorp's water quality certification request has been complete and ready for review for more than a decade." Pet. App. 14a.

The D.C. Circuit denied the petition for panel rehearing and rehearing *en banc*. Pet. App. 17a–20a.

REASONS FOR DENYING THE PETITION

I. Given That The D.C. Circuit's Decision Below Is The First Case To Have Decided The Question Presented, Further Percolation Is Plainly Warranted

A. The D.C. Circuit is the first court to address the Question Presented: whether a State may indefinitely avoid waiver under Section 401 by requiring an applicant to withdraw-and-resubmit its certification request before the expiration of the one-year statutory maximum for Section 401 certification waiver. The D.C. Circuit concluded that such a "withdrawal-and-resubmission scheme," Pet. App. 10a, does not avoid "waiv[ing]" the State's "period of time" to act on a Section 401 application, 33 U.S.C. § 1341(a)(1). No other court has ruled on this issue.

Petitioners conceded as much in their petition for panel rehearing or rehearing *en banc*, where they stated only that the D.C. Circuit's decision "portends conflicts with" other courts, without alleging any actual conflict. Pet. For Panel Reh'g or Reh'g *En Banc* at 4, *Hoopa Valley Tribe*, 913 F.3d 1099 (No. 14-1271), Dkt. 1777034. Now, however, Petitioners claim that the decision below "deepened an existing circuit conflict." Pet. 4, 16. None of the cases that Petitioners rely upon decided the issue, and none conflict with the D.C. Circuit's decision below.

The Fourth Circuit's decision in *AES Sparrows Point LNG, LLC v. Wilson*, 589 F.3d 721 (4th Cir. 2009), Pet. 17–18, does not address the Question Presented. There, the Fourth Circuit held that only the filing of a "valid" Section 401 certification application begins the State's waiver period under Section 401, meaning that an "invalid," incomplete application did not start the waiver clock. 589 F.3d at 728–30. Whether an invalid application starts the Section 401 clock does not answer the question that the D.C. Circuit addressed: whether a State may defer waiver under Section 401 through the withdrawal-and-resubmission procedure, when all agree that the application is valid and complete when originally submitted and that the only change is the withdrawal-and-resubmission of the exact same application. *See* Pet. App. 14a (noting that PacifiCorp's application has been "complete and ready for review for more than a decade").

The Second Circuit's decision in *New York State Department of Environmental Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018), Pet. 18, likewise did not decide the Question Presented. There, the Second Circuit held that a State's period to act on a Section 401 application begins to run when the State first "receives a request," even if the State (erroneously) believes that the request is not "complete." *N.Y. State Dep't*, 884 F.3d at 455–56. The court then held that the State had waived its Section 401 authority by purporting to deny an applicant's request over two years after its initial submission, although that

submission was, in the State's view, incomplete. *See id.* at 453–54. After reaching its holding, the Second Circuit noted in dicta that if a State were to conclude that an application was "incomplete," the State could "simply deny the application without prejudice" or "request that the applicant withdraw and resubmit the application." *Id.* at 456.

The Second Circuit's holding does not address the Question Presented at all, as *New York State Department of Environmental Conservation* did not involve a withdraw-and-resubmit regime at all. *See* Pet. App. 14a. And the Second Circuit's dicta only refers to an applicant resubmitting a "complete" application after withdrawing an "incomplete[ ]" one. *See* 884 F.3d 455–56. That does not relate to a State prolonging waiver by requiring withdrawal-and-resubmission of an identical, *complete* application, like the case here. Indeed, the application here "has been complete and ready for review for more than a decade." Pet. App. 14a. Regardless, a court's dicta is not a "decision" by the court "in conflict with" the D.C. Circuit below. Sup. Ct. R. 10(a).

The Second Circuit's decision in *Constitution Pipeline Co. v. New York State Department of Environmental Conservation*, 868 F.3d 87 (2d Cir. 2017), Pet. 19, similarly did not decide the Question Presented. That decision simply observed the fact that the withdrawal-and-resubmission procedure had occurred there—it did not state, let alone hold, that this procedure lawfully expanded the one-year waiver

maximum under Section 401. *Constitution Pipeline*, 868 F.3d at 94, 100. Indeed, *Constitution Pipeline* did not even address the merits of the Section 401 timeliness issue presented there, since the court concluded that it lacked jurisdiction. *Id.* at 100.

Finally, Petitioners cite in a footnote the Ninth Circuit's decision in *State of California ex rel. State Water Resource Control Board v. FERC*, 966 F.2d 1541 (9th Cir. 1992), which, as Petitioners concede, also "d[oes] not address" the Question Presented. Pet. 19 n.6. This decision held that the State had waived its Section 401 authority by failing to act within a year of receiving an applicant's Section 401 request, although the State had never formally "accepted this request for processing." *California*, 966 F.2d at 1552. The court explained that while previous FERC procedures commenced "the one-year waiver period" when "the certifying agency found the request acceptable for processing," current FERC procedures commence the period when the State simply receives the request. *See id.* at 1552–53; 18 C.F.R. § 4.34(b)(5)(iii). Under those current procedures, the court held that the State had waived its Section 401 authority. *California*, 966 F.2d at 1554. The court rejected the State's arguments that the new FERC procedures were invalid for lack of comment under the APA and that they could not apply retroactively. *See id.* at 1553–54. The Ninth Circuit's decision is irrelevant since there is no dispute here that California and Oregon have received PacifiCorp's Section 401 applications. *See* Pet. App. 14a.

B. Petitioners' claimed fear of "forum-shopping" does not justify this Court's premature review of this splitless issue. Pet. 21–22. A party seeking to challenge a withdrawal-and-resubmission regime would, of course, be better off in the D.C. Circuit because it is the only court to have decided the issue. But, for the same reason, parties seeking to defend the withdrawal-and-resubmission scheme would, all other things being equal, wish to avoid the D.C. Circuit. Pet. App. 14a. In the *only* example of alleged forum shopping that Petitioners raise, *N.Y. State Dep't of Envtl. Conservation v. FERC*, No. 19-1610 (2d Cir. filed May 28, 2019), Pet. 22, both the New York Department of Environmental Conservation and the Sierra Club opposed the transfer motion filed by the pipeline company, and the Second Circuit *denied* the transfer request. *See* Order Denying Mot. to Transfer, *N.Y. State Dep't of Envtl. Conservation*, No. 19-1610, Dkt. 108. None of the parties even mentioned the D.C. Circuit's decision below in their transfer papers.[5] But, in any event, assuming that Petitioners are correct that the Question Presented is at issue in that case, the Second Circuit now may have

[5] *See* Intervenors' Mot. to Transfer, *N.Y. State Dep't of Envtl. Conservation*, No. 19-1610, Dkt. 47 (2d Cir. June 27, 2019); Opp'n of Pet'r N.Y. State Dep't of Envtl. Conservation, *N.Y. Dep't of Envtl. Conservation*, No. 19-1610, Dkt. 62-1 (2d Cir. July 8, 2019); Pet'r Sierra Club's Opp'n, *N.Y. State Dep't of Envtl. Conservation*, No. 19-1610, Dkt. 63 (2d Cir. July 8, 2019); Intervenors' Reply in Supp. of Mot. to Transfer, *N.Y. State Dep't of Envtl. Conservation*, No. 19-1610, Dkt. 76 (2d Cir. July 15, 2019).

the opportunity to address the matter, potentially kicking off the percolation process, as other courts begin to consider the D.C. Circuit's reasoning on this issue.

Petitioners' forum shopping allegation highlights a more general and important point: because *any* aggrieved party to these kinds of FERC proceedings, such as *amici* States or Petitioners and their allies, "may obtain review . . . in the United States court of appeals for any circuit wherein the licensee or public utility . . . is located *or* has its principal place of business, *or* in the United States Court of Appeals for the District of Columbia"—percolation is exceedingly likely to occur in the not-too-distant future. 16 U.S.C. § 825*l*(b) (emphases added); 18 C.F.R. § 385.214(a)(2) (granting States and other entities with Section 401 authority the right to intervene in FERC proceedings). *Amici* States, for example, cite three cases where they are concerned about FERC's recent actions in this area. *See* Brief of State of Oregon et al. as *Amici Curiae* Supporting Pet'rs at 16–19, No. 19-257 (Sept. 27, 2019) ("States' *Amicus* Br."). Those cases arise from projects in New York, *see Constitution Pipeline Co.*, 168 FERC ¶ 61,129, 2019 WL 4072374 (Aug. 28, 2019); *Nat'l Fuel Gas Supply Corp. Empire Pipeline*, 167 FERC ¶ 61,007, 2019 WL 1981663 (Apr. 2, 2019), and California, *see Placer Cty. Water Agency*, 167 FERC ¶ 61,056, 2019 WL 1981750 (Apr. 18, 2019). And both Petitioners and *amici* States claim that this issue is arising in many cases before FERC, with both Petitioners and *amici* States

suggesting that they believe FERC to be taking too broad a view of the D.C. Circuit's rationale, meaning that factual or legal distinctions and nuances abound. Pet. 26–28; States' *Amicus* Br. 16–19. That is a sure recipe for beneficial percolation, as aggrieved parties challenge these FERC decisions in courts across the country. Indeed, subsequent to *amici* States' submission of their brief, FERC denied rehearing in *Placer County*, thus potentially allowing additional judicial review of this issue. *See Placer Cty. Water Agency*, 169 FERC ¶ 61,046, at ¶ 25, 2019 WL 5288297, at *6 (Oct. 17, 2019); § 825*l*(b).

If a square division of authority develops as a result of this imminent percolation, this Court could then take up this issue at that time. This would "allow . . . the issue [to] receive[ ] further study" in the lower courts "before it is addressed by this Court," *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari), thereby "assist[ing] [this Court's] review of this issue of first impression," if such review is later deemed warranted, *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1784 (2019) (Thomas, J., concurring in denial of certiorari).

Relatedly, *amici* States' concern that other federal agencies, operating under different federal licensing regimes, may apply the reasoning of the D.C. Circuit's decision further shows the wisdom of permitting further percolation. States' *Amicus* Br. 20–21. If *amici* States are correct that the D.C.

Circuit's decision will implicate projects outside of the hydropower realm, that would further underscore the importance of permitting the lower courts to work carefully through this issue. Again, if those courts ultimately come to different conclusions, generating an actual division of authority, that would be the proper time for this Court to grant review.

II. The Policy Arguments Raised By Petitioners And *Amici* States Do Not Justify Premature Review Of This Splitless Issue

Petitioners and *amici* States argue that this Court should grant review now because, in their view, the D.C. Circuit's decision threatens federalism, water quality, and the fate of the Klamath Project. Pet. 23–28; States' *Amicus* Br. 5–11, 14–21. These policy arguments do not justify premature review of this splitless issue.

A. Petitioners' and *amici* States' concern that permitting the D.C. Circuit's decision to stand would harm federalism is unfounded. Pet. 23–26; States' *Amicus* Br. 5–11. There is no plausible argument that Congress disrupted the "usual constitutional balance of federal and state powers," *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (citations omitted), when it gave States an important, but strictly time-limited, "role[ ]" in this *federal* regulatory regime, *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994). Rather, the dispute here is far narrower: whether Congress permitted States to

extend the statute's plain-text no-more-than-one-year waiver rule by requiring applicants to withdraw-and-resubmit their requests, year after year. *Amici* States understandably want to keep using the mechanism—who would not want the option to receive an indefinite extension of an important decision deadline?—but their disagreement with the D.C. Circuit's statutory conclusion hardly creates a serious federalism problem, justifying premature review.

Further, notwithstanding *amici* States' claims, States' *Amicus* Br. 9, the Clean Water Act provides States with ample time to use their Section 401 certification authority, without resort to the withdrawal-and-resubmission mechanism.

Most fundamentally (and, ultimately, all that matters), Congress concluded in the statutory text that one year is enough time for the States to act. While Petitioners and *amici* States make various arguments about how some projects are too "complex" for the States to act on within one year, Pet. 24; States' *Amicus* Br. 9, Congress disagreed, providing that the States must act within a "reasonable period of time (which shall not exceed one year)," § 1341(a)(1). All of Petitioners' and *amici* States' arguments that a year is too short for this or that category of project can and should be brought to Congress, not this Court.

There is, in any event, little reason to think that such a statutory amendment would be necessary or

beneficial. By the time an applicant submits a Section 401 certification request with the State, the State will already have had *years'* worth of notice that an applicant intends to seek a hydropower license. 18 C.F.R. § 5.5(a), (c)–(d). The State will already possess the applicant's detailed and voluminous FPA application—supported by years of environmental study. *E.g.*, *id.* §§ 5.6, 5.15, 5.18, 5.23(b). The State will also have had opportunities to seek and obtain water-quality related "information and studies" from the applicant. *Id.* § 5.9 (providing that interested government entities may submit comments on an applicant's pre-application document, including "information and studies needed for . . . water quality certification" under Section 401); *see generally id.* § 5.8–.22. And if a State is not satisfied that an applicant's environmental study plan will sufficiently investigate water-quality impacts of a project, FERC's regulations expressly authorize the State to obtain formal dispute resolution. *Id.* § 5.14. Thus, FERC "encourage[s]" applicants "to consult with the certifying [State] agency . . . concerning [Section 401] information requirements as early as possible" in this process. *Id.* § 5.18(b)(3)(i). That is why, as even *amici* States concede, "[m]ost requests for water quality certification by States can be, and are, approved or denied well within the one-year timeframe set forth in Section 401." States' *Amicus* Br. 9.

Nor would complying with the no-more-than-one-year statutory requirement force the States to approve "[in]complete" requests. States' *Amicus*

Br. 20–21. If a State concludes that a Section 401 request is truly incomplete, then it *should* deny that request. *See AES Sparrows*, 589 F.3d at 725. The applicant would then have the option of submitting a *new* request—that is, one that completes the application—and the one-year clock on that *new* request will then begin. *See id.* at 725–26. But if the request is complete—as all agree the request here was complete for over a decade, Pet. App. 14a—then the State must either make a decision by no later than a year or waive its statutory certification right, as Congress envisioned and provided in the statute.

B. Petitioners' and *amici* States' concerns that the D.C. Circuit's decision will undermine water quality because States have used the withdrawal-and-resubmission mechanism for certain extant projects, Pet. 26–28; States' *Amicus* Br. 14, 16–21, ignores: (1) FERC's responsibility to protect water quality while carrying out its hydropower-licensing responsibilities, and (2) FERC's common practice of taking States' water-quality concerns into account, even where States have waived their water-quality certification authority.

FERC has broad responsibilities to ensure that any hydropower project that it approves satisfies all environmental concerns. As a threshold matter, under the National Environmental Policy Act, FERC must "prepare detailed [environmental] impact statements," which require it to "take a hard look at environmental consequences" before issuing a

hydropower license. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348–51 (1989) (citations omitted). The FPA then mandates that FERC "give equal consideration to the purpose of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), . . . and the preservation of other aspects of environmental quality," including water quality, when issuing licenses. 16 U.S.C. § 797(e). The FPA further requires FERC to ensure that licensed projects are "best adapted to a comprehensive plan for improving or developing a waterway." *Id.* § 803(a)(1). In sum, under the FPA, FERC can grant a license only "after a review that looks to environmental issues as well as the rising demand for power." *S.D. Warren Co.*, 547 U.S. at 373–74.

In carrying out these environmental responsibilities, FERC takes States' environmental concerns into serious account, even where the State has waived its Section 401 authority. *See, e.g.*, *Mead Corp.*, 76 FERC ¶ 61,352, 1996 WL 555654, at *1 n.2 *4–5 (1996); *Wis. Elec. Power Co.*, 76 FERC ¶ 61,183, 1996 WL 442951, at *1, *3–4 (1996); *Twin Falls Canal Co.*, 45 FERC ¶ 61,423, 1988 WL 246992, at *4 (1988). As this Court has explained, "it is quite possible . . . that any FERC license would contain the same conditions as the state § 401 certification" after FERC exercises its independent authority. *PUD No. 1*, 511 U.S. at 722. Under this policy, FERC has independently required conditions such as "instream

flow restrictions," "sediment transport monitoring," "erosion control," and "water quality monitoring" in hydropower licenses. *E.g.*, *Gustavus Elec. Co.*, 109 FERC ¶ 61,105, at ¶ 64, 2004 WL 2430246, at *13 (2004). Indeed, FERC may even impose requirements greater than a State's water-quality standards. *See, e.g.*, *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1219 (9th Cir. 2008). Further, "State fish and wildlife agencies" may submit to FERC "recommendations" for license "conditions" for pending projects, which is a process distinct from the States' Section 401 authority. 16 U.S.C. § 803(j)(1); *see, e.g.*, *FPL Energy Maine Hydro LLC*, 139 FERC ¶ 61215, at ¶ 15, 2012 WL 2135749, at *4 (2012) (including conditions proposed by a State, although the State had waived its Section 401 authority). This process is designed to "adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife . . . affected by [any hydropower] license." 16 U.S.C. § 803(j)(1). And if FERC considers any "recommendation" from the State to be "inconsistent with the purposes and requirements" of federal law, it must "attempt to resolve any such inconsistency, giving due weight to the [State's] recommendations." *Id.* § 803(j)(2).

C. *Amici* States suggest that the D.C. Circuit's decision threatens the successful implementation of the Agreement, States' *Amicus* Br. 15, but this belated assertion is waived and meritless. Neither the *amici* States nor any of the parties so much as suggested below, including at the petition for *en banc*

rehearing stage, that the D.C. Circuit's decision would impact the Agreement in any respect.[6] PacifiCorp remains committed to the successful implementation of the Agreement, and all parties to the Agreement have continued to engage in its implementation, unabated, following the decision below. *See generally* Agreement p. 62, D.C. Cir. JA 403 ("[I]f any provision of this Settlement is held by . . . a court of competent jurisdiction to be invalid, illegal, or unenforceable," then "the validity, legality, and enforceability of the remaining provisions of this Settlement are not affected or impaired in any way.").

III. The D.C. Circuit's Decision Is Correct

While PacifiCorp did not take a position on the withdrawal-and-resubmission procedure before the panel below, upon reviewing the D.C. Circuit's careful, unanimous decision, PacifiCorp agrees that the court's conclusion follows from the "clear" statutory text. Pet. App. 10a. According to that text,

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[6] Brief of California State Water Control Board as *Amicus Curiae* Supporting Intervenors' Petition for Panel Reh'g or Reh'g *En Banc*, *Hoopa Valley Tribe*, 913 F.3d 1099 (No. 14-1271), 2019 WL 1277073; Brief of State of Oregon et al. as *Amici Curiae* in Support of Intervenors' Pet. for Panel Reh'g or Reh'g *En Banc*, *Hoopa Valley Tribe*, 913 F.3d 1099 (No. 14-1271), 2019 WL 1277071; Brief of State of Washington et al. as *Amici Curiae* in Support of Intervenor-Resp'ts, *Hoopa Valley*, 913 F.3d 1099 (No. 14-1271), Dkt. 1589071; Response of Pet'r Hoopa Valley Tribe to Intervenors' Pet. For Panel Reh'g or Reh'g *En Banc*, *Hoopa Valley Tribe*, 913 F.3d 1099 (No. 14-1271), Dkt. 1783443.

a State "waive[s]" its authority under Section 401 if it "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." 33 U.S.C. § 1341(a) (emphasis added). As a matter of plain statutory text, if an applicant withdraws-and-resubmits an unchanged "request for certification"—for example, here, reasserting the request by filing a form letter, year after year, Pet. App. 12a—the "request" remains the same, and the State has just one year to act under the statute's terms.

With all respect, Petitioners and *amici* States offer no persuasive response to the D.C. Circuit's textual analysis. They argue that Section 401 does not "equate[ ] an *applicant's* choice to withdraw and resubmit a request with the *state's* failure or refusal to 'act.'" Pet. 29–30; *see* States' *Amicus* Br. 8. Yet the inquiry under the statutory text is not whether withdrawal-and-resubmission occurred by the State's choice,[7] but whether the withdrawn-and-resubmitted "request" is the same one submitted more than a year before. And while *amici* States' urge this Court to look to Section 401's use of "*such* request," States' *Amicus* Br. 12, the withdrawn-and-resubmitted requests here "were not new requests at all," but were

[7] Such an inquiry would be difficult in a case such as this one, where California and Oregon entered into a "coordinated withdrawal-and-resubmission scheme" with the applicant. Pet. App. 14a.

the same "request" submitted and re-submitted, year after year. Pet. App. 12a.

Perhaps further percolation will eventually lead courts and/or parties to develop a sufficient textual justification for some variant of the withdrawal-and-resubmission mechanism, applicable in some yet-to-be-identified category of requests. But at least given the statutory arguments presented here, the D.C. Circuit's textual analysis appears to be correct.

CONCLUSION

This Court should deny the Petition.

Respectfully submitted,

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