No. 22-616

In The Supreme Court of the United States

TURLOCK IRRIGATION DISTRICT *and* MODESTO IRRIGATION DISTRICT, PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 401 of the Clean Water Act provides that no federal "license or permit shall be granted" for specified activities if a State has "denied" a required water-quality certification. 33 U.S.C. § 1341(a)(1). But such federal license or permit may issue if the required certification "has been obtained or has been waived." *Ibid.* Waiver occurs only if the State "fails or refuses to act on a request for certification" within one year of its submission. *Ibid.* The question presented is whether a State "fails or refuses to act" when it timely denies a request for certification without prejudice to its refiling.

CORPORATE DISCLOSURE STATEMENTS

CORPORATE DISCLOSURE STATEMENT FOR TUOLUMNE RIVER TRUST

Tuolumne River Trust is a non-profit organization founded in 1981 to promote stewardship of the Tuolumne River through education, community outreach, habitat restoration projects, and outdoor adventures for its members along the Tuolumne River. Tuolumne River Trust is incorporated and organized under the laws of California. Tuolumne River Trust certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

CORPORATE DISCLOSURE STATEMENT FOR AMERICAN WHITEWATER, CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, FRIENDS OF THE RIVER, AND THE SIERRA CLUB

American Whitewater is a non-profit corporation incorporated and organized under the laws of the State of Missouri. It does not have a parent corporation and is not publicly held.

California Sportfishing Protection Alliance is a non-profit corporation incorporated and organized under the laws of the State of California. California Sportfishing Protection Alliance does not have a parent corporation and is not publicly held.

CORPORATE DISCLOSURE STATEMENTS – Continued

Friends of the River is a non-profit corporation incorporated and organized under the laws of the State of California. Friends of the River does not have a parent corporation and is not publicly held.

The Sierra Club is a non-profit corporation incorporated and organized under the laws of the State of California. The Sierra Club does not have a parent corporation and is not publicly held.

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A. Legal Background

Congress enacted the Clean Water Act (CWA) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *S.D. Warren Co. v. Maine Bd. of Env't Prot.*, 547 U.S. 370, 385 (2006). While the CWA "establishes a regulatory 'partnership' between the Federal Government and the source State," *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489-90 (1987), the States remain "the prime bulwark in the effort to abate water pollution." *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 393-94 (D.C. Cir. 2017).

"One of the primary mechanisms through which the states may assert the broad authority reserved to them is the certification requirement set out in section 401" of the CWA. *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (citing 33 U.S.C. § 1341). That section "requires an applicant for a federal license or permit to conduct any activity 'which may result in any discharge into the navigable waters'" to obtain a water quality "certification" from the State in which the discharge originates. *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 707 (1994) (quoting 33 U.S.C. § 1341(a)). In that certification, the State certifies that the applicant's activity "will not violate certain water quality standards, including those set by the State's own laws." *S.D. Warren Co.*, 547 U.S. at 374. But "[i]f the State . . . fails or refuses to act on a request for certification, within a reasonable period of time

(which shall not exceed one year) after receipt of such request, the certification requirements" "shall be waived with respect to such Federal application." 33 U.S.C. § 1341(a)(1). A "State's decision on a request for Section 401 certification is generally reviewable only in State court." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011).

B. Factual Background

Petitioners operate two hydroelectric projects located on the Tuolumne River in California—the Don Pedro Project and the La Grange Project. *Turlock Irrigation District, Modesto Irrigation District*, "Declaratory Order On Waiver Of Water Quality Certification," 174 FERC ¶ 61,042, ¶1 (Jan. 19, 2021) ("Declaratory Order"), Pet. App. 40a-41a. By altering the natural hydrologic flow regime of the river and blocking fish passage, those projects adversely affect the health of the Tuolumne River watershed, its biological and aesthetic resources, and its recreational opportunities. JA0692-0693, 1245, 1293-1294, 1562-1564;[1] *see also S.D. Warren Co.*, 547 U.S. at 385. For instance, recreational opportunities in the Tuolumne River watershed depend upon healthy populations of fish and other aquatic species. JA0692. Yet, because of insufficient flows, the anadromous fish populations in the watershed are extremely low. JA0693, 1330. The projects thus directly implicate the interests of respondents, which are non-profit organizations committed to protecting the

[1] Citations to "JA__" are to the parties' Joint Appendix filed with the D.C. Circuit below. D.C. Cir. No. 21-1120, Dkt. 1934418.

non-developmental values of the Tuolumne River watershed, as well as that of their members, who use the river. JA753-819, 1725-1779, 1999-2011.

Under the Federal Power Act, FERC has authority to license certain non-federal hydroelectric facilities for terms of 30 to 50 years. 16 U.S.C. § 791a *et seq*. A licensee is required to reapply for a new license two years before license expiration. 16 U.S.C. § 808(c)(1). In April 2014, petitioners applied for a new license to continue operating the Don Pedro Project; that license expired in April 2016. Declaratory Order ¶2, Pet. App. 41a. In October 2017, petitioners filed for an original license for the already constructed, but unlicensed, La Grange Project after FERC found that this project also requires licensing. *Id*. ¶3, Pet. App. 41a-42a.

As both projects "may result in any discharge into the navigable waters" (33 U.S.C. § 1341(a)(1)), petitioners were also required to obtain Section 401 water quality certifications from the California State Water Resources Control Board ("the Board"). On January 26, 2018, petitioners applied for water quality certifications from the Board for both projects. Declaratory Order ¶5, Pet. App. 42a-43a.

In their requests, petitioners announced their intention to serve as "[l]ead [a]gencies" for purposes of completing environmental review under the California Environmental Quality Act ("CEQA"). Pet. App. 99a, 103a. Under the CEQA, "'[l]ead agency' means the public agency which has the principal responsibility for carrying out or approving a project which may have

a significant effect upon the environment." Cal. Pub. Res. Code § 21067. Until a June 2020 amendment, state law prohibited the Board from issuing a Section 401 certification before the lead agency had completed the CEQA process. Cal. Water Code § 13160 (2020) (amending Cal. Water Code § 13160 (1976)); *see* Cal. Pub. Res. Code § 21000 *et seq*.

On January 24, 2019—within one year of receiving the requests—the Board denied petitioners' requests without prejudice. Declaratory Order ¶6, Pet. App. 43a-44a; Pet. App. 94a-96a. The Board explained that it could not issue certification before completion of the CEQA process, and that petitioners had "not begun" that process. Pet. App. 95a. The Board also explained that FERC had not completed its review of the projects under the National Environmental Policy Act ("NEPA"). Declaratory Order ¶6, Pet. App. 43a-44a; Pet. App. 94a-96a.

On April 22, 2019, petitioners again requested water quality certifications for the projects. Declaratory Order ¶8, Pet. App. 44a-45a. On April 20, 2020—again within one year of receiving petitioners' new requests—the Board denied the requests without prejudice. *Id.* ¶9, Pet. App. 45a; Pet. App. 83a-89a. The Board explained again that it "may not issue a certification until the requirements for compliance with" CEQA are met, and that petitioners still had "not begun the CEQA process" for either project. Pet. App. 84a, 88a. Nor had FERC completed its NEPA environmental process for either project. Pet. App. 84a-85a, 88a. The Board also concluded that, for both

projects, "the proposed activity does not comply with applicable water quality standards and other appropriate requirements"—which "may be grounds for denial of an application for certification." Pet. App. 85a, 89a. The Board encouraged petitioners to submit "new request[s] for certification." Pet. App. 85a, 89a.

On July 20, 2020, petitioners submitted third requests for water quality certifications but withdrew them in November 2020. Declaratory Order ¶¶10-11, Pet. App. 45a-46a.

On January 15, 2021, the Board granted certifications for the two projects. Pet. App. 4a-5a. The Board's certification was based on the 2020 amendment to the California Water Code, which authorized the Board to issue certifications before completion of the CEQA process "if the state board determines that waiting until completion of that environmental review to issue the certificate or statement poses a substantial risk of waiver of the state board's certification authority under the Federal Water Pollution Control Act or any other federal water quality control law." Cal. Water Code § 13160(b)(2) (2020); *see* Declaratory Order ¶11 & n.25, Pet. App. 46a.

The CWA allows state certifications to set conditions on the proposed activity. 33 U.S.C. § 1341(d). Under that authority, the Board's certification set several conditions for petitioners' continued operation of the projects. Pet. App. 5a. One condition requires petitioners to maintain instream flows of 200 cubic feet per second from July through January. JA2054. These

flows are necessary "to maintain recreational beneficial uses" of the river and to protect the river's health. JA2054, 2079-2080. Without them, the river's water temperature would rise; its water quality would drop; predatory fish species would proliferate while the salmon population would dwindle; and access to recreational boating would be slashed. JA2054-2055.

Petitioners are currently challenging the Board's imposition of conditions in California state court. Pet. App. 5a n.3; *see Turlock Irrigation Dist. v. State Water Res. Control Bd.*, No. CV63819 (Cal. Super. Ct., Tuolumne County, filed May 11, 2021).

C. Procedural History

In October 2020—before petitioners had withdrawn their third request for a water quality certification and before the Board had issued its certification—they petitioned FERC for an order declaring that the Board had waived its certification authority for both dams by denying petitioners' requests without prejudice in January 2019 and April 2020. Declaratory Order ¶1, Pet. App. 40a-41a. Respondent organizations and the Board opposed the petition. Pet. App. 47a.

1. FERC denied the petition. Declaratory Order ¶1, Pet. App. 41a. It concluded that the Board did not waive its authority under Section 401(a)(1) because it acted on petitioners' requests within the one-year deadline by denying them without prejudice. *Id.* ¶¶20-36, Pet. App. 53a-66a.

First, FERC rejected petitioners' argument that the Board's denials without prejudice were indistinguishable from the scheme in *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019). In *Hoopa Valley*, the D.C. Circuit held that "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." *Id.* at 1103. FERC explained that, unlike that case, here the Board "acted on" the certification requests by denying them. Declaratory Order ¶28, Pet. App. 60a. Moreover, there was "no record evidence" that the Board and petitioners "engaged in actions amounting to an agreement, formal or functional, to circumvent Section 401's statutory deadline." *Ibid.*

FERC then concluded that, "[b]ased on the plain language of the statute," the Board's denials qualified as actions. *Id.* ¶33, Pet. App. 64a. FERC declined to entertain petitioners' argument that "a non-substantive action, even if styled as a 'denial,' cannot constitute a valid 'action'" because that "would effectively nullify the statute's waiver provision." *Id.* ¶29, Pet. App. 61a (quoting petition). It explained that this argument—which challenged "the validity of" the Board's action—was "a question that turns on state law" and was thus outside FERC's purview. *Id.* ¶32, Pet. App. 63a; *see id.* ¶32, Pet. App. 64a ("[I]t is not the Commission's role to review the appropriateness of a state's decision to deny certification."). And petitioners had not shown that they had "attempted and been

thwarted in an attempt to seek review of the Board's" decisions in state court, or that state-court review was otherwise "foreclosed." *Id.* ¶34, Pet. App. 65a.

2. FERC reached the same conclusions in an order denying rehearing. Pet. App. 11a-28a. Again, FERC concluded that petitioners "provide[d] no support for their claim that the plain language of section 401 requires a state certifying agency to address the technical merits of the request for water quality certification in order to satisfy the requirement that a state act on a request within one year." Pet. App. 19a. And again, FERC explained that petitioners had not demonstrated that the Board's denials were unreviewable in state court. Pet. App. 21a-22a. FERC found petitioners' reliance on EPA's Clean Water Act Section 401 Certification Rule (advanced for the first time on rehearing) forfeited. Pet. App. 23a (citing 85 Fed Reg. 42210 (July 13, 2020)). Finally, FERC reiterated its conclusion that there was no evidence of a "coordinated scheme" to extend the one-year deadline such that *Hoopa Valley* was applicable. Pet. App. 24a-28a.

3. The court of appeals denied petitioners' petitions for review. Pet. App. 10a. The court "agree[d] with FERC that the California Board did not waive its certification authority under section 401(a)(1) and that FERC's ruling is not contrary to *Hoopa Valley*." Pet. App. 6a. *Hoopa Valley*, the court explained, was a case in which state agencies took "*no action at all*." *Ibid.* (quoting *N.C. Dep't of Env't Quality v. FERC*, 3 F.4th 655, 669 (4th Cir. 2021)) (emphasis in original). Such circumstances were "not present in this case," where

the Board acted "within the meaning of Section 401(a)(1)." Pet. App. 7a. That was true for both denials as well as the later grant with conditions. *Ibid.* In so holding, the court emphasized that the Board had denied both requests because they lacked the required documentation and were thus not "complete" or "ready for review." Pet. App. 7a-8a & n.5. The denials were "without prejudice" because petitioners "could apply again" and "the Board's decision did not have preclusive effect." Pet. App. 8a n.7.

Finally, the court was unmoved by petitioners' "slippery slope" argument that state agencies could "extend the time for decision indefinitely" through denials without prejudice. Pet. App. 8a-9a. It noted FERC's statement that courts might "find repeated denials without prejudice, particularly those that do not rest on any substantive conclusions, to be the equivalent of the withdrawal-and-resubmittal scheme." Pet. App. 9a (quoting Pet. App. 65a). Also, such denials might violate state law. Pet. App. 9a n.8. Finally, the court noted that petitioners' interpretation of the statute could lead to the opposing danger of "gamesmanship": applicants "could file certification requests lacking sufficient documentation," thus forcing a State to choose between granting certification without necessary information or waiving its authority. Pet. App. 10a.

The court denied petitioners' petition for rehearing en banc. Pet. App. 71a-72a.

REASONS FOR DENYING THE PETITION

The petition does not claim any division of authority on the question presented, and there is none. Indeed, to the extent the courts of appeals have addressed this issue, they agree that denials without prejudice constitute an "action" rather than a waiver. Petitioners thus seek only error correction where there is none, advancing an atextual reading of the Clean Water Act under which denial of a certification request constitutes inaction on it. Even if there were a division of authority or any error below, certiorari would be unwarranted. Petitioners fail to establish that the issue is one of ongoing importance, particularly given the amendment to the California law at issue here and the lack of evidence that States are circumventing the CWA's requirements without any check. And the availability of state remedies—including remedies that petitioners are currently pursuing—makes this case a particularly poor vehicle for resolving the question presented. Certiorari should be denied.

I. THE PETITION IMPLICATES NO CONFLICT OF AUTHORITY

There is no conflict in the courts of appeals on the question presented, and petitioners do not claim otherwise. Petitions for review of FERC orders may be filed not only in the D.C. Circuit but also in any court of appeals where a licensee or public utility is located or has its principal place of business. 16 U.S.C. § 825l(b). Other courts of appeals thus may address the question

presented. If a division emerges, the Court may grant review at that time. Doing so now is unnecessary.

To the extent other courts of appeals have touched on this subject, they agree with the D.C. Circuit. In *New York State Department of Environmental Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018) ("*New York I*"), for example, the Second Circuit held that a state agency failed to act on a certification application within one year of receiving it and thus waived its certification authority. The state agency had argued that "the review process under Section 401 begins only once . . . a state agency[ ] deems an application 'complete.'" *Id.* at 455. It contended that starting the one-year clock upon application receipt would "force [the agency] to render premature decisions" and "impede a state from working with the applicant to refile in accordance with its [state] requirements." *Id.* at 456. In addressing this concern, the Second Circuit explained that "[i]f a state deems an application incomplete, it can simply deny the application without prejudice—which would constitute 'acting' on the request under the language of Section 401." *Ibid.* The Second Circuit reiterated this interpretation three years later. *See New York State Dep't of Env't Conservation v. FERC*, 991 F.3d 439, 450 n.11 (2d Cir. 2021) ("*New York II*") ("As we stated in *New York I*, states can deny an application without prejudice within the one-year deadline, which will presumably prompt the applicant to resubmit the application with additional material.").

Two other circuits have echoed this understanding. In *California State Water Resources Control Board v. FERC*, 43 F.4th 920 (9th Cir. 2022), *petition for certiorari docketed* (Feb. 8, 2023), the Ninth Circuit explained that a board's statement "that it was fully prepared to 'deny certification without prejudice'" because the applicants had not completed the CEQA process did "not suggest that the State Board was motivated to delay certification." *Id.* at 933.[2] And in *Mountain Valley Pipeline, LLC v. North Carolina Department of Environmental Quality*, 990 F.3d 818 (4th Cir. 2021), the Fourth Circuit held that a state agency "properly denied certification" when it found that a proposed activity fell short of substantive state requirements, but issued the denial "without prejudice to" the applicant "re-submitting its application at a later time." *Id.* at 829.

There is thus no unsettled question or split of authority on whether denial without prejudice of a certification request constitutes an "act" within the meaning of Section 401(a). Review by this Court of the question would be unwarranted.

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[2] The petition for certiorari in that case challenges a separate aspect of the Ninth Circuit's reasoning that is not at issue here: whether California waived its certification authority by (according to petitioners there) "establishing" a withdraw-and-refile practice similar to that in *Hoopa Valley*. Pet. i, *Nev. Irrigation Dist. et al. v. Cal. State Water Res. Control Bd. et al.*, No. 22-743 (U.S. Feb. 6, 2023).

II. THE COURT OF APPEALS' DECISION IS CORRECT

A. The Board "Acted" On Petitioners' Requests And Thus Did Not Waive Section 401's Certification Requirement

1. The plain language of Section 401's waiver provision shows the Board did not waive certification

The court of appeals correctly concluded that the "Board did not waive its certification authority under section 401(a)(1)." Pet. App. 6a. When a statute's terms are "unambiguous," a court's "inquiry begins with the statutory text, and ends there as well." *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 631 (2018) (citation omitted). The language of Section 401's waiver provision is unambiguous. It states:

> [i]f the State, interstate agency, or Administrator, as the case may be, *fails or refuses to act* on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.

33 U.S.C. § 1341(a)(1) (emphasis added). Because "act" is not defined in the statute, it has its ordinary meaning, which is either "to take action" or "to give a decision or award." "Act," *Webster's Seventh New Collegiate Dictionary* (1971). In other words, "Section 401 requires *state action* within a reasonable period of time, not to exceed one year." *Hoopa Valley*, 913 F.3d

at 1104 (emphasis added). Here, the Board timely "acted" within any ordinary meaning of that term because it denied petitioners' requests within a year of receipt. Pet. App. 83a-89a, 94a-96a. Under the plain language of Section 401, the Board did not waive its authority; it exercised it. Pet. App. 7a ("Each time the California Board denied certification, the Board 'act[ed].'").

That the Board denied petitioners' requests *without prejudice* does not alter the conclusion that denial is an action. Section 401 contains no language delimiting what types of denials qualify as "actions." It would be especially illogical to conclude that denials without prejudice are not possible "actions," because denials of water quality certifications typically are without prejudice to renewed requests. Denials *with* prejudice are rare. *See*, *e.g.*, Complaint ¶163, *Lighthouse Res. Inc. v. Inslee*, No. 18-cv-5005 (W.D. Wash. Jan. 3, 2018) (challenging Washington Department of Ecology's denial "with prejudice" as unprecedented). Indeed, EPA's current Clean Water Act Section 401 Rule allows for denials only *without* prejudice. *See* 40 C.F.R. § 121.8(a) ("A certification denial shall not preclude a project proponent from submitting a new certification request, in accordance with the substantive and procedural requirements of this part.").[3] It is thus

[3] Although a district court vacated that rule, *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013 (N.D. Cal. 2021), this Court stayed that vacatur, *Louisiana v. Am. Rivers*, 142 S. Ct. 1347 (2022), and the Ninth Circuit recently reversed it, *In re Clean Water Act Rulemaking*, No. 21-16958, 2023 WL 2129631 (9th Cir. Feb. 21, 2023). EPA has since proposed a new Rule that,

unsurprising that all the other circuits to have addressed this issue agree with the D.C. Circuit that a State "acts" within the meaning of Section 401 when it denies a water-quality-certification request without prejudice. *See New York I*, 884 F.3d at 456; *New York II*, 991 F.3d at 450 n.11; *Mountain Valley Pipeline*, 990 F.3d at 829; *Cal. State Water Res. Control Bd.*, 43 F.4th at 933; *see also* Pet. App. 7a (court of appeals relying on *New York I* and *New York II*).

Nor do a State's grounds for denial—substantive or procedural—affect whether the denial is an "action." Nothing in the statute suggests that a State has failed to "act" when it has denied the request for procedural inadequacies. *See* 33 U.S.C. § 1341(a). In fact, the statute says nothing about the grounds on which states may deny water-quality-certification requests, Declaratory Order ¶32, Pet. App. 63a-64a, and largely leaves it to the States to establish the certification process. *See Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 754 (4th Cir. 2019) ("State Agencies have broad discretion when developing the criteria for their Section 401 Certification."). For that reason, courts

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while not preserving this language, will clarify that a State's "denial of certification" constitutes an "act" so long as the denial identifies certain basic information about the project and "explain[s] why the certifying authority cannot certify that the activity as a whole will comply with water quality requirements." Clean Water Act Section 401 Water Quality Certification Improvement Rule, 87 Fed. Reg. 35318 (proposed June 9, 2022) (to be codified at 40 C.F.R. pts. 121, 122, & 124). Nowhere does the proposed Rule suggest that a denial without prejudice that meets these requirements would not qualify as an act.

have repeatedly concluded that States may, consistent with applicable state law, deny water-quality-certification requests on procedural grounds. *See*, *e.g.*, *Bangor Hydro-Elec. Co. v. Bd. of Env't Prot.*, 595 A.2d 438, 443 (Me. 1991) ("Because Bangor Hydro did not provide the information within the time allotted for review the Board properly denied certification.").

Any other result would leave States without recourse in the face of deficient water-quality-certification requests. States are not meant to certify that a proposed activity will comply with applicable standards when they have not been provided sufficient information to make that determination. But such curable deficiencies typically do not warrant preclusive denials either. And if denials without prejudice *waived* the certification requirement, applicants could bypass their Section 401 burden simply by submitting deficient requests. As the court of appeals determined here, *see* Pet. App. 10a, nothing in the language of Section 401 puts States in such a counterintuitive bind.

2. The structure of Section 401 demonstrates that no waiver occurred

Section 401's structure also forecloses petitioners' position. In addition to explaining when its certification requirement is waived, Section 401 says the following:

> No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit

> shall be granted if certification has been *denied* by the State, interstate agency, or the Administrator, as the case may be.

33 U.S.C. § 1341(a)(1) (emphasis added). The statute thus expressly distinguishes between a waiver (first sentence) and a denial (second sentence). *Cf. Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 652 (4th Cir. 2018) (holding that "under Section 1341(a)(1), 'certification' does not encompass 'waiver,' as the certification requirements do not even apply when a state has waived its certification authority"). While a waiver paves the way for a federal approval, a denial blocks it. Interpreting a denial of certification as itself a waiver illogically pits the provisions of Section 401 against themselves.

3. Denials without prejudice serve Section 401's purpose

The plain meaning of the waiver provision also coheres with Section 401's purpose. Under the CWA, the States are the "prime bulwark in the effort to abate water pollution." *Keating*, 927 F.2d at 622 (citation omitted). And "[o]ne of the primary mechanisms through which the states may assert the broad authority reserved to them is the certification requirement set out in section 401 of the Act." *Ibid.* "Through this requirement, Congress intended that the states would retain the power *to block*, for environmental reasons, local water projects that might otherwise win federal approval." *Ibid.* (emphasis added).

Congress included Section 401's waiver provision not to force state certifications of unsupported requests, but to ensure that federal applications were not frustrated by "sheer inactivity by the State." H.R. Rep. No. 92-911 at 122 (1972); *see New York II*, 991 F.3d at 448 (explaining that Congress "require[d] affirmative state action 'within a reasonable period of time' in order to prevent delay due to a certifying state's passive refusal or failure to act"); *see also Hoopa Valley*, 913 F.3d at 1104 ("California and Oregon's deliberate and contractual idleness defies . . . [Section 401's] requirement."). When a State *denies* an applicant's water quality certification—whether because the project could never meet the State's water quality standards or because the applicant has failed to provide sufficient information to show that it could—it is the State's deliberate decision-making, not "sheer inactivity" or "idleness," that forestalls the project. *Contra* Pet. 24 (arguing that the Board's denials constituted "dalliance or unreasonable delay" (quoting 115 Cong. Rec. 9264)).

B. Petitioners' Arguments Are Without Merit

1. Petitioners' theory equating "denial" with "waiver" cannot be squared with the text of Section 401

Petitioners' contrary "statutory reading" of Section 401, Pet. 23, is difficult to parse. They contend that "[w]hen a State implements a scheme to delay its decision on a certification by issuing pro forma

documents purporting to deny the request every 364 days, and then making clear that the requestor must resubmit the request if it ever wants to obtain the necessary Section 401 certification, that is not an 'act' under Section 401, but a scheme to avoid taking any 'act.'" Pet. 23. This statement appears to align with the arguments petitioners made below that an "act" is not an "act" when it is taken for certain improper purposes. *See* Pet. App. 7a, 24a-28a, 60a. Not only does that theory have no factual support here, *see infra* pp. 21-24, but it is also completely untethered from the statutory text. Indeed, just a breath later, petitioners insist that a State must "give an actual 'yes' or 'no'" in order to act. Pet. 24. That is, of course, exactly what happened here: the Board twice said "no," which "had the legal effect under section 401 of precluding FERC from issuing licenses to" petitioners. Pet. App. 8a (court of appeals' reasoning). Nowhere do petitioners offer a competing definition of the terms "act" or "deny" that would support their contrary reading.

Petitioners also suggest that a State fails to act when it tells a requestor that it "must resubmit the request if the requester ever hopes to obtain certification." Pet. 22-23. Such a message simply describes the obvious consequence of a without-prejudice denial; the applicant must try again if it wants approval. And, in any event, "it must take more than routine informational" communications to "lead to a finding of waiver under § 401." *N.C. Dep't of Env't Quality*, 3 F.4th at 675.

To the extent petitioners continue to rely on the D.C. Circuit's decision in *Hoopa Valley*, *see* Pet. 21, the court of appeals squarely rejected such reliance, Pet. App. 6a, and any purported intra-circuit conflict would not be a basis for review here. In *Hoopa Valley*, California and Oregon had entered into a written agreement with the applicant to "defer the one-year statutory limit for Section 401 approval by annually withdrawing-and-resubmitting the [same] water quality certification requests." 913 F.3d at 1101. On a petition for review of FERC's decision finding no waiver, the D.C. Circuit held that this "deliberate and contractual idleness" constituted a waiver of the States' Section 401 authority. *Id.* at 1103-05. In so holding, the court emphasized that the States had taken no action on the requests for over a decade and that the applicants "never intended to submit a 'new request'" for the states to act upon. *Id.*

As the court of appeals had no trouble finding here, "[t]hose circumstances are not present in this case." Pet. App. 7a. Rather, "[e]ach time the California Board denied certification, the Board 'act[ed]' within the meaning of section 401(a)(1)." *Ibid.* The court also correctly observed that, unlike the "complete" requests at issue in *Hoopa Valley*, petitioners' requests here "were not complete" and "not ready for review, which is why the California Board denied them." Pet. App. 8a.

2. Petitioners' attacks on a State's motivations for denying requests are irrelevant and factually unsupported

In lieu of providing textual or legal support for their interpretation of Section 401, petitioners argue that a plain reading of the statute would permit states to deny certification requests for improper reasons (although petitioners never suggest what those reasons might be). *See* Pet. 25 (arguing that under FERC's orders, a State could "completely evade Section 401's one-year rule for as long as it desires"). In support of this theory, petitioners suggest that the Board's denials here were erroneous in various ways.

To start, this is not an argument that the Board *failed* to act—it is an argument that the Board acted wrongfully. This argument is thus irrelevant to Section 401's plain meaning. Section 401's waiver provision "requires only that a State 'act' within one year of an application." *Alcoa Power*, 643 F.3d at 974. When a State denies a request, it has acted—regardless of its intent in that denial. *Supra* pp. 13-18.

Even if this argument were relevant, it is unsupported by the record. Petitioners presented no evidence that the Board's denials were intended to indefinitely evade Section 401's deadline or to accomplish any other improper purpose. Declaratory Order ¶28, Pet. App. 60a; *see* Pet. App. 8a-9a. The Board's denials instead reflected simple "compli[ance] with State law." Pet. App. 9a n.8. As the court of appeals had no trouble recognizing, the "reason" for the denials was

that petitioners had not started the CEQA process, meaning that the "Board lacked information that it needed to grant certification." Pet. App. 7a n.5. And the Board further explained that it "relies on the environmental document prepared" through the CEQA process to make "its own determination as to whether and with what conditions to grant the certification." Pet. App. 84a, 88a. There is no mystery about the Board's reasons for its actions.

That the Board had certified that petitioners' requests were "complete," Pet. 10, does not alter this conclusion: Under California law, "the application being deemed complete only means that the application has fulfilled the minimum requirements of the State Water Board certification regulations." *In re the Petition of Foothill/Eastern Transportation Corridor Agency for Review of the Denial of Waste Discharge Requirements*, Order No. WQ 2014-0154, 2014 WL 5148275, at *1 n.6 (Cal. State Water Res. Control Bd. Sept. 23, 2014). "Fulfillment of this requirement by an applicant does not mean, and should not be construed to mean, that the applicable regional water quality control board or the State Water Board has received sufficient information to make its determination." *Ibid.*

Petitioners also argue that the Board's denials could not actually have been based on lack of sufficient information because the Board later granted the requests without petitioners having submitted any new information. Pet. 29. But petitioners' brief buries the critical intervening factor: California's 2020 amendment expressly permitting the Board to grant a

certification request before completion of the CEQA process. Cal. Water Code § 13160(b)(2) (2020). The Board's subsequent grant of certification simply applied that new law.

Accordingly, the prospect that States can indefinitely deny requests for whatever reason they "desire[]," Pet. 25, exists only in petitioners' imagination. That is why the court of appeals rejected this "slippery slope" argument as implausible. Pet. App. 9a. These facts also make clear that the "100 years' delay" hypothetical petitioners depict is not a legitimate concern. Pet. 17. To avoid such denials, applicants need only provide the State with the information it requires for a grant of certification. *Contra* Pet. 17 (suggesting that a "requester's failure to supply any relevant water-quality-related information" is irrelevant to the interpretation of Section 401). Petitioners knew the Board required information generated through the CEQA process to make its certification and that it was petitioners' responsibility to complete that process. *Supra* pp. 3-5. Yet as of April 2020, petitioners had not started the CEQA process—even though the Board had explained as early as April 2019 that petitioners could not obtain certification without its completion. Any delay on petitioners' projects resulted from their own inaction, not the Board's.

Finally, petitioners raise a policy argument against a plain-text reading of Section 401. They challenge the underlying principle that States can invoke state law to deny Section 401 certification. Pet. 26 ("Section 401's one-year rule is a federal limit on a State's ability

to delay federally licensed projects. If the only limit on the State's delay is to be found in state law . . . that is not a federal limit at all.") (emphasis omitted). But, of course, such "policy arguments cannot supersede the clear statutory text." *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 192 (2016).

In any event, this policy argument is misguided. The "federal limit" on state authority that Section 401 poses is simply a time limit; it does not limit the scope of a State's authority to block projects that are inconsistent with state law. Indeed, "unilateral" action by a State to block federal licenses (Pet. 23) is a *feature* of the statutory scheme Congress enacted, not a flaw. *Supra* pp. 1-2, 17-18. The state certification requirement—including the state laws that inform whether an applicant may receive certification—is "essential in the scheme to preserve state authority to address the broad range of pollution" that might affect water quality, *S.D. Warren Co.*, 547 U.S. at 386, and ensures that States remain "the prime bulwark in the effort to abate" that pollution, *Del. Riverkeeper*, 857 F.3d at 393-94.

III. THE PETITION DOES NOT RAISE AN IMPORTANT ISSUE REQUIRING IMMEDIATE REVIEW, AND THIS CASE IS A POOR VEHICLE FOR RESOLVING THE QUESTION PRESENTED

Even if there were a split of authority on this issue—and even if petitioners' arguments had merit—certiorari would be unwarranted. Petitioners have

failed to establish that the issue presented is important or urgent enough to justify intervention by this Court. Even if they had, the procedural history of this case makes this petition a particularly bad vehicle for resolving the question presented.

A. The Petition Does Not Raise An Important Issue Requiring Immediate Review

For at least three reasons, the issue presented is of minimal importance or urgency.

First, the Board's denials were the product of a California state-law requirement that no longer exists. The Board may now issue certifications before completion of the CEQA process. *See* Cal. Water Code § 13160(b)(2) (2020); Cal. Pub. Res. Code § 21080; Pet. App. 36a. FERC Commissioner Danly, who dissented on rehearing, lauded this amendment, saying California had "heeded the court's guidance and revised their procedures in order to comply with the reinvigorated one-year deadline." Pet. App. 36a. Petitioners candidly acknowledge that their complaint is with "California law at the relevant time" and "then-extant state law." Pet. 28-29. And they do not suggest that any other states' schemes resemble the old California law. The argument that there is now a "nationwide" danger of similar conduct occurring, Pet. 19, is thus wholly unsupported.

Second, petitioners' sole argument for this case's importance—that States "have proven all too eager to abuse the Section 401 certification process," Pet. 20—is unfounded. *See supra* pp. 19-23. The only evidence

petitioners raise of improper state practices is the "withdrawal-and-resubmission" practice in *Hoopa Valley*. Pet. 20-21. But that problem was solved in *Hoopa Valley* itself.[4] Petitioners also cite the statistic from that case that "27 of the 43 then-pending 'licensing applications before FERC were awaiting a state's water quality certification, and four of those had been pending for more than a decade.'" Pet. 21 (quoting *Hoopa Valley*, 913 F.3d at 1104). But without any information as to why those applications remained pending, this fact is irrelevant to determining the risk (if any) of improper state-driven delays. And, as FERC explained here, "[i]t may be that the courts will find repeated denials without prejudice, and particularly those that do not rest on any substantive conclusions, to be the equivalent of the withdrawal-and-resubmittal scheme" invalidated in *Hoopa Valley*. Pet. App. 65a. If this Court wishes to guard against state abuse of certification authority, it should wait for a case (1) that actually involves such abuse and (2) where neither FERC nor a court of appeals did anything to remedy it.

Third, EPA rulemaking could ultimately be relevant to the question presented, but it is not complete. As noted above, petitioners argued to FERC that EPA's 2020 Clean Water Act Section 401 Certification

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[4] Petitioners' amici likewise contend that "[s]ome States"—although they name only one: New York—"have employed various tactics to evade compliance with the one-year limitation." Interstate Natural Gas Ass'n of Am. Amicus Br. 13. But every example they cite (*id.* at 13-14) resulted in a FERC finding of waiver, showing that FERC is already enforcing Section 401's deadline without any intervention by this Court.

Rule supported their position, but FERC found that argument forfeited. Pet. App. 23a. (The Ninth Circuit recently ordered that rule reinstated. *In re Clean Water Act Rulemaking*, No. 21-16958, 2023 WL 2129631 (9th Cir. Feb. 21, 2023).) EPA also has proposed a rule that, if adopted, would further clarify the meaning of a denial under Section 401. *See supra* p. 14 n.3. It would be premature for this Court to intervene while the status of relevant rules is in flux (and in a case where the petitioners forfeited an argument based on those rules).

B. This Case Is A Poor Vehicle For Resolving The Question Presented

Even if the issue petitioners raise is of sufficient importance or urgency, this is not the right case through which to address that issue.

First, petitioners' grievance ultimately boils down to a challenge to the *validity* of the Board's action: that is, to the propriety of denying a certification request when the requestors have not complied with state-law requirements. Not only does that claim depart from their ostensible question presented—what qualifies as an "act"—but it also involves an issue that is expressly reserved for state courts. "[A] State's decision on a request for Section 401 certification is generally reviewable only in State court, because the breadth of State authority under Section 401 results in most challenges to a certification decision implicating only questions of State law." *Alcoa Power*, 643 F.3d at 971. That is especially true for denials of certification because

the CWA says nothing about the grounds on which a State may deny certification requests, leaving the matter to state law. Accordingly, "[i]f a state refuses to give a certification, the courts of that state are the forum in which the applicant must challenge that refusal if the applicant wishes to do so." H.R. Conf. Rep. No. 91-940 at 56-57 (1970). That is where other applicants have challenged States' denials of their requests without prejudice due to insufficient information. *See*, *e.g.*, *Bangor Hydro-Elec. Co.*, 595 A.2d at 443; *Long Lake Energy Corp. v. N.Y. State Dep't of Env't Conservation*, 164 A.D.2d 396, 400 (N.Y. App. Div. 1990).

Here, petitioners never established they could not obtain relief from the Board's denials in state court because they never attempted to do so. Pet. App. 15a (FERC making this observation). Instead, they attempted to have *FERC* decide this question of California state court jurisdiction, but FERC was "unconvinced" by petitioners' argument that California law "foreclosed" any attempt to seek review of without-prejudice denials. Pet. App. 21a. Even if this Court were otherwise inclined to consider the issue presented here, it should wait for a case where an applicant actually shows that state judicial review is foreclosed. Pet. App. 22a ("Without successfully establishing that the Board's denials without prejudice are not reviewable in state court, it remains unseen whether such denials render section 401's one-year deadline 'superfluous' or otherwise violate section 401.").

Second, the Board eventually *granted* petitioners' certification requests, albeit with conditions. Pet. App. 4a-5a. Petitioners are not in fact trapped in the endless-delay dilemma they describe; the Board rendered a decision on certification. In fact, it is petitioners who are extending the certification process through two separate proceedings. First, petitioners are currently challenging the Board's decision through a suit in state court. *See Turlock Irrigation Dist. v. State Water Res. Control Bd.*, No. CV63819 (Cal. Super. Ct., Tuolumne County, filed May 11, 2021). Second, petitioners petitioned the Board for reconsideration of its decision. *See* Cal. Water Res. Control Bd., *Notice of Opportunity to Respond to Petitions for Reconsideration of Water Quality Certification for Don Pedro Hydroelectric Project and La Grange Hydroelectric Project, Federal Energy Regulatory Commission Project Nos. 2299 and 14581* (2021).[5] Petitioners have provided this Court with no information on the status of those related proceedings, both of which appear actively ongoing. Any forthcoming decision on those challenges, including any determinations regarding the validity of the Board's actions, could affect the significance of the decision below and petitioners' need for certification—yet another reason why this case is in a poor posture for resolution by this Court.

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[5] https://www.waterboards.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/lagrange/dplg-petitions-notice.pdf.

CONCLUSION

The petition for a writ of certiorari should be denied.

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