No. 22-743

IN THE

Supreme Court of the United States

NEVADA IRRIGATION DISTRICT, *ET AL.*,

Petitioners,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, *ET AL.*,

Respondents.

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

NON-GOVERNMENTAL RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In this case, the United States Court of Appeals for the Ninth Circuit set aside orders of the Federal Energy Regulatory Commission (FERC) because they were not supported by substantial evidence. FERC's orders had concluded that the State of California waived its authority under the Clean Water Act, 33 U.S.C. § 1341(a)(1), to issue water quality certifications for the relicensing of four major hydropower projects by "fail[ing] or refus[ing] to act" by the statutory deadline. The Ninth Circuit found that the record demonstrated that California was prepared to take timely action by denying the certification requests without prejudice, but that the applicants chose to withdraw their requests to avoid denials. The question presented is:

Whether the court of appeals correctly found that FERC's orders concluding that California waived its authority under § 1341(a)(1) were not supported by substantial evidence.

RULE 29.6 STATEMENT

The non-governmental respondents joining in this brief are the South Yuba River Citizens League, California Sportfishing Protection Alliance, Friends of the River, and the Sierra Club (including its Mother Lode and Tehipite Chapters). All are nonprofit, non-stock corporations that do not offer shares to the public and have no parent corporations, and no publicly held corporation holds an ownership interest in any of them.

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INTRODUCTION

The petition in this case asks this Court to review an intrinsically factbound decision: The Ninth Circuit found that there was no substantial evidence to support rulings of the Federal Energy Regulatory Commission (FERC) that the State of California had waived its right to certify water-quality compliance of four hydropower projects under the Clean Water Act. As to each of the projects, FERC erroneously held that California coordinated with the license applicants to delay certification and thus "fail[ed] or refuse[d] to act on [the] request[s] for certification" within one year of the certification requests, as required by the Act, 33 U.S.C. § 1341(a)(1). Carefully reviewing the factual record of each proceeding, the court of appeals determined that undisputed evidence established that the state made clear that it was prepared to act on each of the requests for certification within the one-year deadline—by denying them without prejudice because the applicants had not provided analyses of the projects' environmental impacts. The *applicants* then chose to withdraw their requests prior to the deadline and resubmit them, rather than have the state deny them. The court of appeals held that, under FERC's stated view of § 1341(a)(1), the state's "acquiesce[nce]" in the applicants' "own decisions to withdraw and resubmit their applications rather than have them denied" was not a coordinated refusal to act on the requests and did not waive certification. Pet. App. 22a. The court, therefore, vacated the orders and remanded the matters to the agency. The record-based determination that, even applying FERC's own view of § 1341, FERC's orders are unsustainable under the Federal Power Act's substantial evidence standard, 16 U.S.C. § 825*l*(b), does not merit review by this Court.

The applicants' petition for certiorari rests on the false assertion that the court of appeals' decision implicates a conflict among the circuits. No court of appeals, however, has held that a state waives its Clean Water Act certification authority by allowing an applicant to withdraw and resubmit a certification request when, as in this case, the record shows the state is fully prepared to timely act on an inadequate request by denying it without prejudice if the applicant does not withdraw it. The D.C. Circuit's decision in *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), on which petitioners principally rely, holds that a state waives certification if it expressly agrees with an applicant not to act on a certification request. The decision below does not contest that proposition.

As the Fourth Circuit has recognized, "*Hoopa Valley* is a very narrow decision," finding a waiver where state agencies and a license applicant "entered into a written agreement that obligated the state agencies, year after year, *to take no action at all* on [a] certification request"; *Hoopa Valley* does not apply where an applicant withdraws and resubmits a request that the state would otherwise deny. *N.C. Dep't of Envtl. Quality v. FERC*, 3 F.4th 655, 669 (4th Cir. 2021) (*NCDEQ*) (emphasis in original). Petitioners baldly assert that the Fourth Circuit's characterization of *Hoopa Valley* "conflicts with … the D.C. Circuit's view of its own precedent." Pet. 26. In fact, the D.C. Circuit has explicitly stated that "[t]he Fourth Circuit accurately described *Hoopa Valley*" and has held that, absent the circumstances described by the Fourth Circuit, *Hoopa Valley* does not compel a finding of waiver. *Turlock Irrig. Dist. v. FERC*, 36 F.4th 1179, 1183 (D.C. Cir. 2022).

Petitioners' assertion that the decision below conflicts with rulings of the Second Circuit is equally off the mark. The Second Circuit has held that the plain language of the Clean Water Act precludes states from altering the one-year deadline triggered by "receipt" of a request for certification, 33 U.S.C. § 1341(a)(1), by counting from a different starting point. *See N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 456 (2d Cir. 2018) (*NYDEC I*); *N.Y. State Dep't of Envtl. Conservation v. FERC*, 991 F.3d 439, 447–48 (2d Cir. 2021) (*NYDEC II*). In this case, there was no manipulation of the one-year deadline: The applicants withdrew their requests before the deadline in the face of California's stated intention to act by that deadline. The Second Circuit's decisions explicitly acknowledge that such circumstances do not amount to a waiver. *See NYDEC I*, 884 F.3d at 456; *NYDEC II*, 991 F.3d at 450 n.11.

Absent a conflict, there is no reason for review of the decision below. The court of appeals correctly held that a state that has informed an applicant that it is prepared to act on its certification request by the deadline, and that does not do so only because the applicant chooses to withdraw the request, has not failed or refused to act on the certification request. A contrary approach would reward "gamesmanship," *Turlock*, 36 F.4th at 162, by finding waiver by the state where an *applicant* acted to prevent a timely denial of an inadequate request by withdrawing it just before the deadline.

Moreover, there are abundant other reasons to deny review. The issue raised is unlikely to recur because of changes in California law that increase the state's discretion to issue merits determinations on certification even when, as in this case, applicants

have failed to complete all necessary environmental analyses within a year of submitting their waiver requests. In addition, since *Hoopa Valley*, when an applicant has failed to provide the information necessary to support a certification request, California has routinely acted on the request by denying it without prejudice rather than allowing the applicant to withdraw the request. As the D.C. Circuit held in *Turlock*, a state that denies a request without prejudice has, under the plain meaning of § 1341(a)(1), "act[ed] on a request." 36 F.4th at 1183–84. Further, ongoing Environmental Protection Agency (EPA) rulemaking proceedings are likely to lend greater precision to determination of the circumstances in which a state's actions with respect to a request for certification amount to waiver of certification authority. Although the outcome of the regulatory process will not control this case or others involving requests made before the issuance of the regulations, the regulations will apply prospectively and minimize still further the importance of the resolution of this case.

STATEMENT

A. Legal Background

The Clean Water Act's embrace of cooperative federalism gives states a significant role in the federal licensing of facilities that may result in discharges into navigable waters. Under the Act, an applicant for a license or permit from a federal agency to construct or operate such a facility must provide the agency a certification from the state where the discharge will originate that the discharge will comply with various provisions of the Act, including those that incorporate state water-quality standards. 33 U.S.C. § 1341(a)(1). The state's certification is required to specify

conditions necessary to assure compliance with effluent limitations and other requirements of the Act, as well as with "any other appropriate requirement of State law set forth in such certification," which "shall become a condition on any Federal license or permit subject to the provisions of this section." *Id*. § 1341(d). If a project will not comply with applicable clean-water requirements even with conditions, the state must deny certification and the project may not be licensed. *Id*. § 1341(a)(1).

Hydroelectric power projects that FERC licenses and relicenses—for lengthy terms of 30 to 50 years—typically are subject to the certification requirements of § 1341 because they result in discharges into navigable waters. State certification for the relicensing of hydropower projects originally licensed decades ago, before advances in water-quality protections offered under the Clean Water Act and the state laws that work hand-in-hand with it, often requires significant new conditions to protect water quality and assure the availability of clean water for fish and wildlife habitat, recreation, and drinking water.

Section 1341(a)(1) provides that if a state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application." Nothing in the provision, however, requires that a state act on a request that has been withdrawn by the applicant. As a result, FERC for many years took the view that, regardless of surrounding circumstances, an applicant's withdrawal and resubmission of a certification request restarted the one-year period for certification as long as the withdrawal took place within a year of the state's

receipt of the request. *See* Pet. App. 8a–9a (citing FERC orders from 1994–2018).

In 2019, the D.C. Circuit held in *Hoopa Valley* that a formal agreement between states and an applicant obligating the states to take no action on a certification request and the applicant to continually withdraw and resubmit the request to extend the deadline for action indefinitely was a failure or refusal by the states to take action and waived the certification requirement. 913 F.3d at 1104–05. The court described such a "coordinated withdrawal-and-resubmission scheme" as an attempt by both the states and the license applicant to circumvent FERC's authority. *Id.* at 1103. The court expressly stated that the case presented only "the set of facts in which a licensee entered a written agreement with the reviewing states to delay water quality certification," *id.* at 1104, and it decided only the question whether a state waived its certification authority when an applicant withdrew and resubmitted its certification request "pursuant to an agreement between the state and applicant," *id.* at 1103.

Nonetheless, FERC subsequently extended *Hoopa Valley* to find waiver in cases where, although a state and an applicant had not entered into a formal agreement to delay certification, FERC found evidence of an "informal, coordinated schem[e]" to put off certification through repeated withdrawals and resubmissions. Pet. App. 20a (citing FERC orders). Under FERC's standard, however, a state does not waive authority whenever an applicant withdraws and resubmits a certification request to restart the one-year clock. Rather, where the *state*'s course of conduct does not have the "motivation to restart the one-year clock," and the applicant "acted unilaterally and in its

own interest" in withdrawing and resubmitting its request, the state has not failed or refused to take action, and there is no waiver. *Village of Morrisville, Vt.*, 174 FERC ¶ 61,141, at P12 (2021), *cited in* Pet. App. 21a. Under FERC's view, "the motivations of the licensee and especially of the certifying agencies" are critical to "whether the states waived their … authority" by engaging in "deliberate idleness." *Id*. at P10, P12.

B. Facts and Decision Below

The court of appeals' opinion describes accurately and at length the four relicensing proceedings and certification requests that give rise to this case. Pet. App. 9a–18a. Each involves a California hydroelectric project originally licensed in the 1960s for a term expiring in 2013 or, in one instance, 2014. The current licensees for each project are public bodies that are political subdivisions of the state: two irrigation districts and a county water agency. In each case, the licensee applied to FERC for relicensing and, during the pendency of the relicensing proceedings, has continued to operate its project(s) under a series of one-year interim licenses that lack the water-quality conditions that will inevitably be imposed when the projects are certified by the relevant California agency, the State Water Resources Control Board, under § 1341(a)(1).[1]

The applicants submitted their initial requests for certification to the state at various times between 2012 and 2017. California law requires that environmental impact reports under the California Environmental Quality Act (CEQA) be prepared and provided to the State Water Resources Control Board in

[1] Among other things, the projects' effects on native fisheries require numerous conditions on relicensing to improve instream habitat.

connection with certification requests, and, at the time of these requests, further required the Board to deny any certification request that was not supported by such a report. When an applicant seeking approval of a project requiring environmental review under CEQA is a public agency, the applicant is designated as the "lead agency" responsible to perform the environmental impact report. *See* Pet. App. 6a–7a. In each case, the Board informed the public-agency applicants that they were responsible for preparing the required CEQA evaluation and that failure to submit it would result in denial of their certification request, without prejudice to refiling.[2]

None of the applicants prepared the required CEQA evaluations, despite the state's repeated reminders that certification could not be granted without them.[3] Instead, they repeatedly chose to withdraw

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[2] For one of the two Merced Irrigation District projects, Merced Falls, a private entity was the licensee when certification was first requested, and the Board was the lead agency under CEQA until the license was transferred to the Merced Irrigation District, but neither FERC's orders nor the petition suggest that that distinction affects the issues here. See Pet. App. 26a n.14.

[3] Petitioners suggest that their failure to do so is attributable to the state because an applicant cannot initiate the CEQA review process until FERC completes its own final environmental impact statement (FEIS) under the National Environmental Policy Act for the projects. Pet. 10. That assertion is legally unfounded. *See* Cal. Pub. Res. Code § 21083.7(a) (applicant should use the federal FEIS when "possible"). It also flies in the face of the facts of this case. For the Yuba-Bear River project, FERC's FEIS was completed in December 2014, Pet. App. 35a, but the Nevada Irrigation District had not yet even begun the CEQA process five years later. *Id.* 11a. Similarly, FERC issued the FEIS for the two Merced projects in December 2015, *id.* 82a, but the responsible agency, the Merced Irrigation District, had still not commenced the CEQA process four years later. *Id.* 17a.

and resubmit their certification requests to drag out the process while the projects continued to operate under interim licenses without the additional requirements that would be imposed if the projects were certified and relicensed. In each case, the Board communicated its readiness to comply with the state-law requirement that it deny each successive, inadequate request for certification without prejudice within a year of its submission if it were not withdrawn by the applicant first. Although the Board *predicted* the applicants would choose withdrawal and resubmission over denial without prejudice, and asked the applicants to do so in a timely manner, it made clear in each case that it would deny the certification requests if they were not withdrawn based on the applicants' failure to provide the required environmental evaluation.

After the D.C. Circuit issued its opinion in *Hoopa Valley* in January 2019, the Board issued decisions denying without prejudice the then-pending request for certification for each of the projects. By that time, each of the applicants had already dragged out the process for years by not completing the required CEQA analyses, and each had benefited from the ability to continue operating the projects in the meantime without additional conditions aimed at water-quality protection. Sensing the opportunity to free themselves completely from the prospect of conditional certification, the applicants petitioned FERC for declaratory orders determining that California had waived certification under § 1341(a)(1) by engaging in a coordinated scheme with them to delay certification beyond the one-year deadline.

Purporting to apply the standard announced in its previous decisions extending *Hoopa Valley* to informal coordination schemes—but not to acquiescence in an

applicants' own choice to withdraw and resubmit a certification request—FERC ruled that the state had waived certification with respect to each project. The substantively similar orders relied heavily on the state's expectation that it would be in the applicants' interest to refile and on communications from the state requesting that the applicants submit withdrawals, if that was indeed their preferred course of action, before the Board was forced to deny the requests. FERC's orders also wrongly stated that the state had failed to dispute that the Board "had all of the information it needed to act," Pet. App. 45a, 67a, when in fact it was undisputed that the applicants had failed to provide the necessary CEQA environmental impact reports. The orders also ignored that the state had repeatedly made clear its readiness to act on the requests by denying them without prejudice because of the applicants' recalcitrance. Finally, FERC's orders failed to address the point—deemed decisive in prior orders—that the applicants had the motive to delay and benefited from the delay.

The Board, and the environmental organizations that had intervened to support it in the FERC proceedings, filed petitions for review of each order in the Ninth Circuit. The court of appeals vacated each of FERC's orders on the ground that they were unsupported by substantial evidence—the applicable standard of review under the Federal Power Act, 16 U.S.C. § 825*l*(b). *See* Pet. App. 4a.

The court of appeals' decision did not question the correctness of either *Hoopa Valley* or FERC's extension of that decision to *informal* coordinated schemes to delay certification. Instead, assuming the correctness of FERC's legal standard, the court held that the record did not support FERC's conclusion that the

proceedings involved a coordinated delay scheme rather than the state's acquiescence in the applicants' own decision to withdraw and resubmit their requests—which FERC agreed would not constitute a waiver. Thoroughly examining the record of each proceeding, the court found that the state had not "sought a withdrawal-and-resubmission for its own purposes"; rather, "the evidence shows only that the State Board acquiesced in the Project Applicants' own decisions to withdraw and resubmit their applications rather than have them denied." Pet. App. 21a–22a.

The court pointed out that FERC had wrongly treated the Board's statements about what it *predicted* the applicants would do as evidence of the Board's own intentions; that FERC had overlooked the Board's repeated statements that it was prepared to deny the applications without prejudice if they were not withdrawn; that FERC had mischaracterized California regulations as "'codify[ing] [the] practice' of withdrawal-and-resubmission," Pet. App. 27a, when they in fact prescribed denial of certification without prejudice when an applicant failed to comply with CEQA, unless the applicant withdrew its request; and that FERC had erroneously stated that the Board did not dispute that the applicants had supplied all information needed to act on their requests, when it was undisputed that the requests could not be granted under then-applicable law because of the applicants' failure to provide CEQA environmental impact reports. *See id*. 23a–29a. And critically, the court pointed out that FERC had identified no basis for concluding that delays that benefited the applicants were in the state's interest. Rather, "the State Board, unlike the Project Applicants, would have had an interest in moving along the environmental-review process." *Id*. 26a. In

sum, "nothing in the record shows that the State Board encouraged" the applicants to choose withdrawal-and-resubmission over denial of certification by the Board. *Id*. 29a.

For these reasons, the court vacated FERC's orders and remanded to the agency. That action leaves the applicants free to continue operating the projects under interim permits while pursuing relicensing, subject to state certification and any conditions that may be imposed as a result to ensure that they will not continue operating those projects for decades to come in a manner that adversely affects water quality. For each project, the state has now granted certification, subject to numerous water-quality conditions, and the certification orders are subject to ongoing administrative and/or state-court proceedings. Meanwhile, FERC must in any event complete Endangered Species Act consultations with other federal agencies before the projects can be relicensed.

REASONS FOR DENYING THE WRIT

I. There is no conflict among the circuits.

Because a factbound court decision that a FERC waiver determination lacks support in the administrative record obviously does not merit review by this Court, petitioners assert that this case presents something more: a conflict among the circuits. That assertion is transparently incorrect. No court of appeals has held that a state waived certification under circumstances comparable to those here, where the record demonstrates the state was prepared to act on the requests—by denying them without prejudice because of the applicants' failure to meet the requirements for certification under applicable state law—but instead acquiesced in the applicants' decisions to withdraw

their requests before the expiration of the one-year deadline. Indeed, petitioners concede that the *only* case they cite that involved such facts—the Fourth Circuit's decision in *NCDEQ*, 3 F.4th 655—is "consistent" with the decision below. Pet. 25. Petitioners' invocation of D.C. and Second Circuit decisions finding waivers under very different factual circumstances does not demonstrate inter-circuit conflict.

A. The decision below accords with D.C. Circuit precedent.

Petitioners rest their claim of conflict mainly on the D.C. Circuit's decision in *Hoopa Valley*. Their contention that the Ninth Circuit's decision in this case conflicts with the law applied by the D.C. Circuit, however, is untenable for multiple reasons.

First, unlike this case, *Hoopa Valley* did not involve a state that was willing to act on a request for certification within the one-year deadline but had no need to do so because of an applicant's own decision to withdraw the request. Rather, the relevant states in *Hoopa Valley* (California and Oregon) had entered into a "formal agreement" with the applicant to "defer the one-year statutory limit for [certification] by annually withdrawing-and-resubmitting the water quality certification requests." 913 F.3d at 1101. That agreement "explicitly required abeyance of all state permitting reviews" unless and until federal funding for the project was secured. *Id*. The court emphasized that the "single issue" it resolved was "whether a state waives its [certification] 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 308 (emphasis

added). The court held that such an agreement constituted a waiver because it reflected the state's "deliberate and contractual idleness." *Id.* at 310. The court emphasized that it was not addressing the consequences of withdrawal and resubmission of requests on other facts. *See id.*

Here, by contrast, California did not enter into an agreement not to act on any certification request. Rather, in each case, the state explicitly stated that it was prepared to act within one year of the submission of each pending request, by denying it without prejudice, unless the applicant preferred to withdraw and resubmit the request. *See* Pet. App. 12a, 14a, 16a, 23a, 25a, 26a. As the court of appeals found, the state had no reason to prefer one or the other of these two "functionally equivalent" courses of action as long as one or the other occurred before the one-year deadline. *Id.* 29a n.16. Nor did the state have reasons to delay the relicensing proceedings. It was the *applicants* who were responsible for the failure to carry out the steps required for the state to grant certification; the *applicants* who benefited from delay because it allowed them to continue operating the projects pending relicensing without additional water-quality protections; and the *applicants* who preferred to withdraw and resubmit their certification requests rather than have them denied without prejudice to resubmission. *Id.* 28a–29a & n.16. Under such circumstances, *Hoopa Valley*'s rationale—that the statute aims "to curb a *state*'s 'dalliance or unreasonable delay,' " 913 F.3d at 1104 (emphasis in original)—is not implicated.

Second, nothing in the Ninth Circuit's opinion suggests any disagreement with either the reasoning or result of *Hoopa Valley*. The court of appeals described the circumstances of *Hoopa Valley* and the holding of

the case without criticizing any aspect of the decision's analysis. *See* Pet. App. 9a, 19a–20a. The court further noted that, following *Hoopa Valley*, FERC had gone one step beyond that case's holding by ruling that waiver occurs not only where states enter into express agreements to delay certification, but also where they are parties to "more informal, coordinated schemes." *Id*. 20a. The court did not disagree even with FERC's *extension* of *Hoopa Valley*'s holding; rather, it assumed the correctness of the legal standard that FERC applied. *Id*. 22a ("We need not decide whether the coordination standard FERC advances is consistent with the text of [§ 1341(a)(1)]."). The court held that, even under FERC's expansive view of *Hoopa Valley*—under which a "coordinated" withdrawal-and-resubmission scheme constitutes a waiver, but a states' "acquiesce[nce] in a project applicant's own decision to withdraw and refile" does not, *id*. 21a—there was no substantial evidence supporting a finding of waiver. *Id*. 22a.

Third, the D.C. Circuit's subsequent decision in *Turlock*—which petitioners barely mention, *see* Pet. 26 n.8, 29—makes clear that there is no conflict between its approach and that of the Ninth and Fourth Circuits. In *Turlock*, as in this case, California was presented with requests for certification for two hydropower projects from applicants that had not carried out their responsibility to prepare an environmental impact evaluation, which at the time was a state-law prerequisite to the state's grant of certification. California denied each request in *Turlock* without prejudice within one year of its submission. The applicants resubmitted the requests; California again denied the requests without prejudice within a year, and the applicants again resubmitted the requests.

The applicants then asked FERC to rule that the state had waived certification, but FERC declined to find a waiver. On review, the D.C. Circuit held that under § 1341(a)(1)'s plain terms, the state's timely denial of a request, without prejudice to its resubmission, is not a failure or refusal to act that constitutes a waiver. 36 F.4th at 1183. That is, *Turlock* held that there was no waiver where California took the exact action it was prepared to take in this case, and where the consequences of the state's action were functionally identical to what it did in this case.

In reaching its holding in *Turlock*, the D.C. Circuit emphasized the limits of its holding in *Hoopa Valley*. The court rejected the applicants' argument that, because the effect of the state's action in both cases was to delay certification of the projects, *Hoopa Valley* required a finding of waiver under the circumstances in *Turlock* as well. *Id*. at 1183–84. In so doing, the court adopted the Fourth Circuit's explanation in *NCDEQ* of why *Hoopa Valley* does not require waiver where a state acquiesces in an applicant's decision to withdraw and resubmit its certification request: "The Fourth Circuit accurately described *Hoopa Valley* as a case in which 'the state agencies and the license applicant entered into a written agreement that obligated the state agencies, year after year, to *take no action at all* on the applicant's § [1341] certification request.' " *Id*. at 1183. The court confirmed the Fourth Circuit's view that *Hoopa Valley* does not control where "[t]hose circumstances are not present." *Id*.

Turlock directly contradicts petitioners' assertion that the Fourth Circuit's "understanding of *Hoopa Valley* … conflicts with … the D.C. Circuit's view of its own precedent." Pet. 26. Petitioners support that statement only with a footnote that in turn cites a

footnote in *Turlock* characterizing a FERC order, *see id*. 26 n.8, not the D.C. Circuit's precedent. They completely ignore the explicit endorsement in *Turlock*'s text of *NCDEQ*'s understanding of D.C. Circuit precedent. *Turlock* leaves no doubt that that same understanding is shared by each of the circuits that have addressed the scope of *Hoopa Valley*: the Fourth Circuit in *NCDEQ*, the D.C. Circuit in *Turlock*, and the Ninth Circuit below. *See also Turlock Irrig. Dist. v. FERC*, No. 22-616, Br. for Fed. Resp. in Opp., at 18 (U.S. filed Mar. 8, 2023) (noting consistency of *Turlock* with the decision below in this case).

B. Second Circuit precedent also supports the decision below.

Petitioners' fallback claim that decisions of the Second Circuit would require a finding of waiver in this case is likewise groundless. Neither of the two decisions that petitioners cite, *NYDEC I* and *II*, holds that a state that is prepared to act on a certification request within a year of its submission waives certification if it acquiesces in an applicant's decision to withdraw the request and resubmit it, starting the clock anew. The cited decisions stand instead for the unremarkable proposition that under the statute's plain language—which provides that a state waives certification if it "fails or refuses to act on a request for certification, within … one year ... after receipt of such request," 33 U.S.C. § 1341(a)(1)—the state cannot count the one-year period from a date other than the date on which a request was received. *NYDEC I*, 884 F.3d at 456; *NYDEC II*, 991 F.3d at 447–48. This case involves no similar disregard of the statutory terms governing the commencement of the one-year period:

California was always prepared to act on each certification request within one year of receiving it.

Grasping at straws, petitioners argue that the *NYDEC* decisions reflect the view that § 1341(a)(1), establishes a "bright-line rule" intended to "*reduce flexibility*," Pet. 23 (quoting *NYDEC II*, 991 F.3d at 449, 450), and that similar policy concerns require rejection of the Ninth Circuit's decision in this case. That argument fails for several reasons.

To begin, petitioners' projection of the Second Circuit's supposed policy concerns onto the different circumstances of this case does not establish a conflict between the holdings of the cases. The Second Circuit's *holdings* rested on the statutory language triggering the one-year period based on the date of "receipt" of a request. The "bright-line rule" dictated by that language is not implicated here, where the triggering of the one-year period is not at issue.

Moreover, the circumstances of this case, unlike those of the *NYDEC* cases, do not involve dalliance by the *state*, which was prepared to act on the requests in this case within one year of receipt. It was petitioners who failed to supply the information needed for the state to grant the certification requests and who chose to withdraw and resubmit their requests to avoid the state's denials.

Most tellingly, petitioners' speculation about how the Second Circuit's view of the statute would lead it to rule in the circumstances of this case ignores the best evidence on that point—what the Second Circuit said: "If 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 [1341(a)(1)]. It could also

request that the applicant withdraw and resubmit the application." *NYDEC I*, 884 F.3d at 456; *see also NYDEC II*, 991 F.3d at 450 n.11 (similar). Recognizing that the Second Circuit's statements support the decision below, petitioners belittle them as "dicta." Pet. 24 n.7. That the sentences were dicta, however, only underscores that the *NYDEC* cases did not present and did not decide the question presented here—which is why their holdings *cannot* conflict with the decision below. At the same time, that the statements are not holdings does not alter the point that they contradict petitioners' assertions that the *NYDEC* opinions demonstrate that the Second Circuit would reach a result opposed to the Ninth Circuit's on the facts of this case.

II. The court of appeals' decision is correct.

Beyond their erroneous claim of conflict among the circuits, petitioners argue that the court below erred in holding that the record lacked substantial evidence to support FERC's conclusion that California waived certification by failing or refusing to act on petitioners' requests within a year of receiving them. Absent a conflict, such a factbound claim of error would "rarely" support a request for review by this Court, even if it were arguably meritorious. S. Ct. R. 10. And here, there is no merit to petitioners' assertion that the court of appeals' decision was wrong.

As the court of appeals carefully explained, the record evidence in each proceeding showed that California was prepared to act on each of petitioners' requests for certification within one year of receiving it, and would have denied each request without prejudice based on petitioners' undisputed failure to perform and submit an environmental evaluation as required

by state law at the time. Pet. App. 22a–26a. As the court also explained, the undisputed evidence of petitioners' prolonged failure to comply with this requirement clearly contradicted FERC's statements that California "had all of the information it needed" to rule on the certification requests. Rather, the evidence showed that the state had "continually reminded" the applicants "that it did not have the information it would need to *grant* a request—namely, the [environmental] evaluation that California law required." *Id.* 28a. In light of petitioners' failure to submit the information needed for a grant of certification, California predicted that they would prefer to withdraw their requests rather than have them denied, and it requested that they submit such withdrawals in advance of the one-year deadline if they did not want the requests to be denied without prejudice. *Id.* 23a–26a. It was the applicants' choice to withdraw their requests, and it was their own interest in not having their requests denied—not any interest of the state in delaying a decision—that led them to make that choice. *Id.* 28a–29a.

Under such circumstances, the plain language of § 1341(a)(1) forecloses any finding of waiver. California certainly did not "refuse" to act on the requests: The record leaves no doubt that California was willing and prepared to deny each request without prejudice within a year of receiving it. And a state does not "fail" to act on a request when it has been withdrawn before the statutory deadline for action. To "fail" means "[t]o be deficient or unsuccessful; to fall short of achieving something expected or hoped for." Black's Law Dictionary 739 (11th ed. 2019). Because the statute imposes no obligation to act on requests that have been withdrawn, not acting on them is not a "failure" to take any required or expected action. *See* Pet. 30

(acknowledging that a state is not required to act on a voluntarily withdrawn request to avoid waiver).

Petitioners try to sidestep this point by suggesting at various points in the petition that California's former prohibition on granting certification before completion of an environmental evaluation under CEQA was itself improper because it prevented certification within the one-year deadline. Petitioners' attacks on a requirement that California law no longer imposes, however, offer no issue of importance for this Court to resolve. And in any event, the lawfulness of that requirement is not included in the petition's question presented and would not properly be before the Court even if it were, because it was not decided by FERC or by the court below.[4]

Had petitioners wished to challenge the lawfulness of the requirement that they complete an environmental evaluation before certification could be granted, they could have declined to withdraw their certification requests, received denials without prejudice based on their failure to comply with the requirement, and challenged the lawfulness of the denials in a California state court. They did not take that course. The only question presented here is whether an applicant who withdraws a request for certification in order to avoid an inevitable denial without prejudice under state law can successfully claim that the state waived certification just by acquiescing in the withdrawal and allowing the applicant to resubmit the request. Because such proceedings involve no failure or refusal to act by the state, the answer to that question is no.

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[4] Indeed, FERC expressly stated that the reason for the withdrawal and resubmission was "immaterial." Pet. App. 45a.

III. Accepting petitioners' arguments would undermine the certification process by allowing applicants to game the system.

Petitioners' arguments seek to transform their own derelictions and delays into a waiver by the state. That result is unsupported by the statutory language and would have pernicious consequences. As Judge Randolph observed in rejecting similar arguments by the applicants in the *Turlock* case, petitioners' approach "could lead to gamesmanship. Applicants could file certification requests lacking sufficient documentation. That would leave the State in an untenable position. … The State would be stuck with the Hobson's choice of either granting certification without necessary information or waiving its power to decide." 36 F.4th at 1184 (cleaned up). In effect, applicants could negate state-law certification requirements by refusing to comply with them and then withdrawing their first requests for certification just in time to avoid denial by the state.

The potential for gamesmanship is magnified when, as in this case, applicants have benefited for years from their failure to provide the state with the information needed to make a merits determination on certification. As the court of appeals explained, the consequence of petitioners' decision to withdraw and resubmit their requests has been that they have been able to continue to operate the projects under interim licenses that are not subject to the water-quality protective conditions that the state would impose through § 1341 certification. *See* Pet. App. 26a–27a. Only after *Hoopa Valley* led them to believe that they might be able to parlay their actions into a *permanent* exemption from imposition of such conditions did petitioners change course and ask FERC to find that the state had

waived certification by purportedly colluding with them to delay their licensing proceedings.

Petitioners' invocation of *Hoopa Valley*, however, overlooks that if the circumstances of this case really placed it within the scope of *Hoopa Valley*'s holding, the consequence would not be just that the state had waived certification, but also that the applicants themselves had failed "to diligently prosecute [their] licensing application[s]." *Hoopa Valley*, 913 F.3d at 1103. *Hoopa Valley*, after all, was not a case where an applicant who colluded to delay certification was allowed to benefit by being freed from the Clean Water Act's requirements. Rather, in that case, a third party who opposed relicensing of the project at issue argued that the agreement between the state and the applicant to delay certification constituted both a waiver of certification and a failure of the applicant to prosecute its relicensing application. *See id.* at 1100. The D.C. Circuit explicitly recognized that the waiver and failure to prosecute arguments were intimately "connected" and that both turned on whether the agreement between the states and the applicant was permissible. *Id.* at 1103. If (as the court ultimately concluded) it was not permissible, "then the states' *and licensee's* actions were an unsuccessful attempt to circumvent FERC's regulatory authority of whether and when to issue a federal license." *Id.* (emphasis added).

By asserting that *Hoopa Valley* applies here, petitioners necessarily accuse *themselves*, as well as California, of scheming to delay their own relicensing proceedings. But contrary to *Hoopa Valley*'s implication that an applicant's participation in such an agreement to delay certification jeopardizes the license application because it amounts to failure to prosecute, petitioners seek to benefit from what, under their own

theory, is their own wrongdoing. Petitioners cannot have it both ways: If *Hoopa Valley* applied here, they would have to accept the consequences of their own participation in what they call an "impermissible scheme." Pet. 3. Accepting petitioners' invitation to apply only the aspect of *Hoopa Valley*'s holding that would benefit them (its finding of waiver), while allowing them to enjoy the benefits of their self-described scheming, would greatly compound the ill consequences of extending that decision to the different circumstances of this case.

IV. A number of factors make review of the question posed by the petition unnecessary and inappropriate at this time.

A. Petitioners complain that California's "resistance" to FERC licensing proceedings, Pet. 28 n.12, leads to a "high volume" of delays, resulting from withdrawal and resubmission of certification requests attributable to California's former requirement that environmental evaluations be completed before certification can be granted, *id*. 29. They gloss over, however, the fact that California law has changed, and now permits the state to grant certification prior to completion of an environmental evaluation if necessary to further avoid the possibility that FERC will find that the state waived certification by refusing or failing to take timely action. *See* Cal. Water Code § 13160(b)(2).

Even without regard to the change in California law, the agreement between FERC and the courts of appeals that states do not waive certification if they deny certification without prejudice has already led states, including California, to rely on such denials out of an abundance of caution rather than acquiescing in withdrawal and resubmission of requests by

applicants. The *Turlock* case is illustrative: There, with concerns about waiver raised by the pendency of *Hoopa Valley* in the forefront, California acted on a deficient certification request by denying it without prejudice rather than allowing the applicants an opportunity to withdraw it.

Together, these two factors will relegate withdrawal and resubmission to a greatly diminished role in certification proceedings, regardless of the outcome of this case. The change in California law makes it less likely that applicants' failure to perform environmental evaluations will delay water-quality certification, and D.C. Circuit precedent makes it more likely that the state will issue denials without prejudice when certification cannot be granted by the one-year deadline. Accordingly, addressing the consequences of withdrawal and resubmission is a matter of little or no ongoing importance. Reviewing that subject in this case would thus do nothing to streamline future licensing proceedings. It would, however, potentially cause further delay to the relicensing proceedings in this case, which would best be advanced by resolution of pending administrative and state-court challenges to the state's certification of each project and completion of the relicensing process subject to valid water-quality conditions imposed by the state.

B. Ongoing rulemaking activity is likely to have a significant bearing on how courts address waiver issues under § 1341(a)(1) and, therefore, could render any merits decision this Court might issue if it were to grant certiorari obsolete or academic. EPA, which has rulemaking authority under the Clean Water Act, promulgated a rule in 2020 addressing the determination of the "reasonable period of time" for acting on a certification request under § 1341(a)(1). *See* 40 C.F.R.

§ 121.6. The rule provides, among other things, that a "certifying authority is not authorized to request the project proponent to withdraw a certification request." *Id*. § 121.6(e). That provision, which was inapplicable to the proceedings in this case but has now gone into effect, *see In re Clean Water Act Rulemaking*, 60 F.4th 583 (9th Cir. 2023), would, assuming its validity, inform any determination of whether California could engage in the kinds of communications with applicants that the petitioners here cite to support their claim of waiver, in the unlikely event that similar circumstances were to arise in the future.

In 2022, EPA issued a new notice of proposed rulemaking to amend the reasonable-time rule and other parts of the 2020 rules implementing § 1341. *See* 87 Fed. Reg. 35,318 (2022). If adopted, the new rule would delete the provision preventing states from asking applicants to withdraw certification requests and allow states "to determine on a case-by-case basis whether and when withdrawal and resubmittal of a certification request is appropriate." *Id*. at 35,342. In addition, EPA's rulemaking notice requests comment on whether it should "establish[ ] regulations specifically authorizing withdrawals and resubmissions in certain factual situations." *Id*. Finalization of the current proposal, or of a possible rule explicitly authorizing withdrawal and resubmission would, like the current rule, affect the outcome if future cases were to present circumstances similar to those in this case.

Whatever the outcome of the rulemaking—issuance of a new rule allowing states to request withdrawal of certification requests, or retention of the current rule limiting such requests—EPA regulations will likely have a substantial effect on the outcome of any future cases involving circumstances similar to

those here. The Court should not reach out to address the issue in a case that predates the finalization of the regulatory framework that will govern the issue going forward. Given the ongoing regulatory process, a decision by the Court in this case could well prove to be outdated even before it is issued.

C. Finally, the existence of alternative grounds for affirmance not reached by the court of appeals in light of its holding that FERC's orders were not supported by substantial evidence provides yet another reason for leaving the decision below undisturbed. The Ninth Circuit's decision made it unnecessary for the court to consider whether the standard announced by FERC in the wake of *Hoopa Valley*—that informally coordinated efforts by states and applicants to delay certification amount to waiver under § 1341(a)(1)—is correct and may be applied retroactively to requests that were withdrawn and resubmitted before FERC formulated that rule. *See* Pet. App. 22a & n.12. If the Court were to take up this case, those significant questions would also require consideration.

In addition, the court of appeals did not address the argument of the environmental-organization respondents that FERC erred by failing to consider whether petitioners' unclean hands—as participants in and principal beneficiaries of the "scheme" to delay certification that they challenged—should bar them from benefiting further by escaping the possible imposition of state water-quality conditions on the relicensing of their projects. Given that *Hoopa Valley* condemns applicants who collude to delay certification as much as it condemns states, *see supra* 23–24, that failure would have been fatal to FERC's orders had the court needed to address it. Similarly, the court of appeals had no need to address the environmental

organizations' arguments, that, under the circumstances here (including FERC's application of a new legal standard and the applicants' role in preventing the state from issuing a certification within one year of the initial request), FERC was required to consider whether the one-year limit was equitably tolled.

* * *

In short, for several independent reasons, the outcome in this case should and would be the same even in the unlikely event that the Court were to resolve petitioners' question presented in their favor. That consideration—on top of the absence of any compelling reason to address the question to begin with—would make granting certiorari in this case an especially improvident use of this Court's decisional resources.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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