No. 19-257

In The Supreme Court of the United States

CALIFORNIA TROUT & TROUT UNLIMITED,

Petitioners,

v.

HOOPA VALLEY TRIBE & FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

As the petition describes, this case presents the important and unresolved question of whether a state "fails or refuses to act . . . within . . . one year" when an applicant withdraws and resubmits its certification requests under the Clean Water Act. 33 U.S.C. § 1341(a)(1). Respondents do not deny that this question is important to the exercise of state authority that this Court recognized in *Public Utility District No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 704 (1994), and *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 386 (2006). Instead, Respondents make three unsuccessful arguments in opposition to the petition.

First, Respondents try to explain away the three-way circuit conflict. Respondents suggest that there is no conflict because each of these circuits considered a slightly different issue—issues that Respondents draw so narrowly that each circuit decision would be inappropriately limited to its facts.

Even drawing these issues narrowly, Respondents' approach overlooks that these issues are just reformulations of the same question of when and how a state waives its certification authority under section 401—an analysis that now looks different in the Second, Fourth, and D.C. Circuits. That circuit conflict alone warrants the Court's review.

Second, Respondents argue that the practical consequences of this case are not serious. Notably, Respondents do not deny the threat of immediate and irreversible harm to water quality arising from the restraints that the D.C. Circuit's decision imposes on the states. Instead, they skip over those environmental consequences and argue only that this case does not implicate state interests.

But the only comfort that Respondents offer the states is that the federal government will step in and do the states' job for them—an argument that clashes with the text and purpose of the Clean Water Act, and which only heightens federalism concerns. Indeed, twenty-one states have urged the Court to grant the petition—a fact that, by itself, belies Respondents' argument that this case does not implicate state interests.

Finally, FERC takes the lead among the Respondents in arguing the merits. These merits arguments, however, are the opposite of what FERC contended in the proceedings below: that the clear statutory text supports *Petitioners'* interpretation, and no other.

In sum, the petition presents an important and unresolved issue of federal law, with grave consequences for the states and the quality of the nation's waters. Certiorari is warranted.

ARGUMENT

I. The circuit conflict warrants this Court's review.

As the petition showed, the Second, Fourth, and D.C. Circuits now have different approaches to determining when states waive their certification authority under the Clean Water Act. Pet. 16–22.

Respondents argue that the circuits addressed different issues. In making this argument, however, Respondents draw the issues so narrowly that the conflicting decisions would be limited to their facts—a limitation that those decisions did not impose. *See* Hoopa Valley Tribe's ("Tribe's") Opp. at 13; FERC's Opp. at 16. In reality, the issues that the circuits considered are just reformulations of the same question: When does a state "fail[] or refus[e] to act . . . within . . . one year" under section 401? 33 U.S.C. § 1341(a)(1).

Respondents contend that the circuits are united in their answer to that question, because all the circuits agree that a state's "failure or refusal to act" within one year results in waiver. E.g., Tribe's Opp. at 13. But that argument merely repeats the disputed statutory text verbatim. *See ibid.* It fails to acknowledge that three circuits have different answers for what that text means. Pet. 16–22 (describing the Second, Fourth, and D.C. Circuits' divergent approaches).

That three-way circuit conflict, by itself, warrants the Court's review. *See Gwaltney of Smithfield, Ltd. v.*

Chesapeake Bay Found., Inc., 484 U.S. 49, 56, (1987) ("We granted certiorari to resolve this three-way conflict in the Circuits."); *see also*, *e.g.*, *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019); *State Farm Fire and Casualty Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436 (2016).

Respondents' other attempts to disprove the circuit conflict are likewise unavailing.

First, Respondents acknowledge the Second Circuit's conclusion that states can avoid waiver if they "request that the applicant withdraw and resubmit the application," *N.Y. Dep't of Envtl. Conserv. v. FERC*, 884 F.3d 450, 456 n.35 (2d Cir. 2018), but they argue that this conclusion is dicta. Respondents stress that the facts of that case did not involve a withdrawal and resubmission.

That factual distinction, however, does not change that the Second Circuit reached a legal conclusion that directly conflicts with the decision below. *Compare ibid.*, *with* App. 3a ("We conclude that the withdrawal-and-resubmission of water quality certification requests does not trigger new statutory periods of review."). Moreover, when the Second Circuit reached that conclusion, it cited with approval an earlier decision that *did* involve withdrawal and resubmission. 884 F.3d at 456 (citing *Constitution Pipeline Co. v. N.Y. State Dep't of Envtl. Conserv.*, 868 F.3d 87, 94 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 1697 (2018)).

Next, Respondents argue that the decision below is "limited to the specific facts before it." FERC Opp. at 16. FERC, in particular, is in no position to make this argument.

In the months since the decision below was issued, FERC has applied the decision below across a wide array of circumstances, concluding that "[t]he *Hoopa Valley* court did not in any way indicate that its ruling was limited solely to the case before it." Order on Remand, *Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129, 61,721 (Aug. 28, 2019); *see also* Declaratory Order on Waiver of Water Quality Certification, *Middle Fork American Project*, 167 FERC ¶ 61,056, *rehearing denied*, 169 FERC ¶ 61,046 (Oct. 17, 2019) (same); Order Issuing Original License, *McMahan Hydroelectric, LLC*, 168 FERC ¶ 61,185 (Sept. 20, 2019) (same).

Indeed, FERC has acknowledged that the decision below was a question of statutory interpretation. *See Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129 at 21–25. In other words, FERC has conceded that the question presented is a pure question of law, not one that turns on facts.

Next, FERC mentions the EPA's proposed rulemaking. FERC Opp. at 19–22. But this proposed rulemaking has no meaningful impact on the question presented, because section 401 is a direct delegation of power to the *states*. *See* 33 U.S.C. § 1341(a)(1). It is not a delegation of authority to the EPA.[1] *See Jefferson*

[1] This direct delegation of authority to the states stands in contrast to other Clean Water Act delegations of authority,

County, 511 U.S. at 704 (holding that the Clean Water Act reserves "distinct roles for the Federal and State Governments").

FERC does not suggest—nor could it—that the EPA could constrain Congress's direct delegation of section 401 authority to the states. Thus, whether the EPA ultimately agrees or disagrees with the D.C. Circuit's approach has no bearing on the question presented. If anything, the EPA's observation that the decision below amounted to a "plain language analysis of the statute," 84 Fed. Reg. 44080, 44108 (Aug. 22, 2019), only undermines Respondents' argument that the decision is "limited to the specific facts before it." FERC's Opp. at 16.

Finally, PacifiCorp argues that the Court should allow the circuit conflict to percolate further. PacifiCorp's Opp. at 2. As the petition explained, however, the decision below threatens immediate and irreversible harm to the nation's water quality. Pet. 26–28. That harm would last for generations, *id.*, and has already begun with FERC's decisions finding waiver under the decision below. *See supra* at 5. Those immediate consequences are too serious to let the issue percolate any longer. *Ibid.*

As these points show, Respondents' arguments only confirm the need for the Court's guidance. The circuit conflict warrants this Court's review.

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which the states administer only through or with the EPA. *See*, *e.g.*, 33 U.S.C. § 1342(b) (providing EPA with oversight of states implementing certain water-quality permit programs).

II. The decision below significantly impacts state interests and the nation's water quality.

A. Respondents' arguments on state interests fail.

The petition described how the question presented has significant implications for the states. Pet. 23–25. Indeed, a broad array of twenty-one states—with environmental policies as diverse as those of Hawaii and Mississippi—have urged this Court to grant the petition. *See* States' Amicus Br.

Respondents make several arguments in opposition. Each of them fails.

First, Respondents argue that states should not be concerned about section 401 waiver because FERC will fill the gap with water-quality measures of its own. *See*, *e.g.*, PacifiCorp's Opp. at 25.

That argument is misguided. Cutting the states out of the process is the opposite of what the Clean Water Act established: a statutory scheme where the states, and not the federal government, have the *primary* rights and responsibilities to protect the quality of water within their boundaries. *See Jefferson County*, 511 U.S. at 704; *accord S.D. Warren*, 547 U.S. at 386. Thus, the notion that the federal government will simply do the states' job for them only heightens the federalism concerns that the petition describes. Pet. 23–26.

Moreover, Respondents' proposed fix lacks a foundation in federal law. When a state is deemed to

have waived its certification authority, it is only *possible*, at best, that FERC will decide to incorporate state water-quality requirements into its own license conditions. PacifiCorp's Opp. at 24. Even then, FERC would be bound by a mandate that looks very different than the uncompromising mandate that Congress gave the states. *See* 16 U.S.C. § 803(a) (requiring that FERC strike a balance between competing uses of a given waterway); 16 U.S.C. § 797(e) (requiring that FERC give "equal consideration" to these competing uses).

Next, Respondents argue that the D.C. Circuit's approach will not burden the states, because under FERC's standard process, states should be able to make a decision on a certification request before they ever receive it. That argument fails, because FERC's process is no substitute for the states' certification process. FERC's process is limited to "only those studies that are necessary for [FERC] to obtain an understanding of a project sufficient to carry out its responsibilities under [federal law]," not state law. *Hearing on Discussion Drafts Addressing Hydropower Regulatory Modernization and FERC Process Coordination under the Natural Gas Act*, 114th Cong. 11 (2015) (testimony of Ann F. Miles). In other words, FERC develops a record for what FERC needs, not for what the states need. *See ibid.*; *accord Hydroelectric Licensing Under the Federal Power Act*, 102 FERC ¶ 61,185 at 96 (Feb. 20, 2003).

Consequently, the FERC process is no solution for the problems inherent in the D.C. Circuit's approach.

Until the "full environmental impacts, including impacts on water quality, are known," states cannot effectively make a decision on the request. States' Amicus Br. at 9.

In sum, Respondents' assertion that the D.C. Circuit's approach "does not limit or impair state authority to protect water quality in any respect" lacks merit. Tribe's Opp. at 3. As nearly half of all the states have made clear, the decision below "threatens to have far-reaching, adverse effects for States." States' Amicus Br. at 14.

B. Respondents do not deny the environmental consequences of the decision below.

Under the D.C. Circuit's decision, states will have unknowingly waived their certification authority on dozens of federally licensed projects, despite FERC's longstanding position that withdrawal and resubmission does not result in waiver. Pet. 26–28. As the petition describes, that approach threatens to cause immediate and lasting harm to the environment—harm that is too serious to ignore. *Ibid.*

Notably, none of the Respondents deny these environmental consequences. Indeed, FERC and PacifiCorp do not mention them at all.

The Tribe tacitly admits to this environmental threat. It claims (incorrectly) that the decision would

not affect "*future* certification requests," but avoids discussing the past certification requests on pending projects that would give rise to the environmental harm that the petition describes. Tribe's Opp. at 19 (emphasis added).

Although not responsive to the petition, Respondents also claim that Petitioners and the states are seeking an interpretation of section 401 that would harm the environment. *Id.* at 22.

The Court should be skeptical of the suggestion that the states, which are statutorily obligated to protect water quality, and Petitioners, which are conservation groups whose mission is to protect water quality, would seek a result that would worsen water quality.

Even if the Court were to indulge this theory, however, it would only strengthen the case for certiorari. As described above, Respondents do not deny that the D.C. Circuit's decision threatens to cause immediate environmental harm. Pet. 26–28. But they suggest that Petitioners' approach—that is, the Second Circuit's approach—would cause environmental harm. If that were true, then it would mean that *two* (rather than one) of the circuits' divergent approaches is causing environmental harm—a conclusion that only underscores the need for the Court's immediate review.

In short, Respondents have no effective rebuttal to the environmental consequences described in the petition.

III. Petitioners have strong merits arguments.

FERC focuses much of its opposition brief on the merits, while the other Respondents say relatively little. FERC's Opp. at 10–13. That is notable, because FERC's arguments are the opposite of the arguments it made in all of the proceedings below.

Indeed, FERC has held that position for nearly thirty years. In 1991, FERC adopted the rule that a state could issue a denial "without prejudice to the applicant's refiling of an application that complies with the agency's requirements." 56 Fed. Reg. 23001, 23127 (May 20, 1991). In short, FERC recognized that a state could deny a certification request without prejudice and let the applicant reapply—the functional equivalent of withdrawal and resubmission. *See ibid.*

Thus, when FERC denied the Hoopa Valley Tribe's petition in its published decision, it concluded that withdrawal and resubmission does *not* result in waiver under the clear and unambiguous text of section 401. App. 39a–40a. FERC further explained that, in view of this clear statutory text, no additional analysis is appropriate. *Id.* at 42a.

FERC defended this position before the D.C. Circuit. *See* FERC's D.C. Cir. Br. at 19–26. There, FERC argued that its decision was supported by the "literal interpretation of Section 401's text." *Id.* at 21. FERC further warned against "inserting additional terms in the statute," *id.* at 22, and it argued that the

legislative history relied on by the Tribe "does not require a different interpretation."[2] *Id.* at 24.

Now, for reasons having nothing to do with the (unchanged) text of section 401, FERC argues the opposite. *See* FERC's Opp. at 10–12.

With all respect, FERC got it right the first time. Given FERC's repeated contention that the statutory text clearly and unambiguously supports Petitioners' interpretation and no other, FERC's contention now that the statutory text *forecloses* this interpretation should be rejected out of hand.

As for the other Respondents, their merits arguments fare no better.

The Tribe briefly criticizes Petitioners for noting that it was the applicant, PacifiCorp, that withdrew the certification requests. Tribe's Opp. at 25. As the petition describes, however, that point is important, because nothing in section 401's text prohibits *an applicant* from submitting and then choosing to withdraw its request for certification before the one-year period expires. Pet. 29–30. Instead, section 401's text provides that a state's authority is waived only "[i]f *the State* . . . fails or refuses to act on a request for certification." 33 U.S.C. § 1341(a)(1) (emphasis added).

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[2] For this reason, Respondents' suggestion that Petitioners should present their arguments to Congress misses the point. There is no reason for Petitioners to do so, because as FERC (until recently) contended, the clear statutory text supports Petitioners' interpretation.

PacifiCorp's merits arguments fail for similar reasons. Despite acknowledging that Congress enacted section 401's waiver provision to protect applicants like itself, *see* Pet. 30, PacifiCorp seems to suggest that the D.C. Circuit's approach could be upheld on the theory that "states *require* applicants" to withdraw and resubmit their applications. PacifiCorp's Opp. at 1 (emphasis added).

PacifiCorp's "duress" theory lacks merit, especially when one considers the source. After all, PacifiCorp made a calculated business decision to withdraw and resubmit its certification requests four times. Pet. 12. Then, after four years of withdrawal and resubmission, PacifiCorp "voluntarily negotiated and signed" a settlement agreement under which it continued this practice. App. 42a.

PacifiCorp suggests, however, that the Court should conclude that it only submitted *one* request. PacifiCorp Opp. at 11 ("the very same" request). Yet in the same breath, PacifiCorp acknowledges that it submitted multiple "requests" (plural). *Id.* at 10–11 (emphasis added).

This disjunction only highlights an important component of the textual analysis that the D.C. Circuit misapprehended. The state's one-year deadline is tied to each individual request, without regard for the content of that request. 33 U.S.C. § 1341(a)(1). The statute does not ask whether one request is "the same" as any other request, nor does it ask courts to test for "sameness." *See ibid.*

Instead, section 401's text provides for waiver only "[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." *Ibid.* (emphasis added). By failing to give effect to Congress's particular choice of words, the D.C. Circuit erred in interpreting a critically important federal statute.

* * *

In sum, Respondents' attempts to explain away the circuit conflict do not succeed, and their failure to rebut the serious consequences of the D.C. Circuit's decision only confirm the need for the Court's immediate review.

Section 401 of the Clean Water Act should not have different meanings in different circuits. With nearly half of all the states calling for the Court to intervene, and with the quality of our nation's waters hanging in the balance, certiorari is warranted.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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