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.

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

BRIEF OF HYDROPOWER *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether California "fail[ed] or refuse[d] to act" on Petitioners' requests for water quality certification within one year, as Section 401 of the Clean Water Act requires, 33 U.S.C. § 1341(a)(1), by establishing the withdraw-and-refile practice to give the State "more time to decide," App.8a, project applicants' certification requests.

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae National Hydropower Association ("NHA"), Kings River Conservation District ("KRCD"), South Feather Water & Power Agency ("SFWPA"), Northwest Public Power Association ("NWPPA"), Northwest Hydroelectric Association ("NWHA"), Modesto Irrigation District ("MID"), Turlock Irrigation District ("TID"), Rye Development ("Rye"), and Public Utility District No. 1 of Snohomish County, Washington ("Snohomish") (together, "Hydropower *Amici*") consist of trade associations representing the hydropower industry nationwide as well as electric utilities, water districts, and other hydropower project owners and operators, each of whom may be affected by the Court's decision here.

NHA is a nonprofit trade association that represents the hydropower industry nationwide. NHA is dedicated exclusively to preserving and expanding clean, renewable, affordable hydropower and marine energy resources across the country. Currently, NHA has over 300 member organizations who span the entire hydropower industry supply

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[1] Pursuant to Rule 37.2, *Amici* provided timely notice to all parties of their intent to file this amicus brief. Further, per this Court's Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part, and that no party, counsel for a party, or any person other than *Amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this amicus brief.

chain, from large power generators to service and equipment providers. As particularly relevant here, members of NHA are regularly involved in hydropower licensing or relicensing proceedings before Respondent the Federal Energy Regulatory Commission ("FERC"), and must comply with Section 401's requirement to obtain a water quality certification (or a waiver) from the State.

KRCD is a California public agency created in 1951 by the Kings River Conservation Act. KRCD was formed to be the local agency responsible for the operations and maintenance of the U.S. Army Corps of Engineers' flood control project downstream from Pine Flat Dam for safe passage of flood water in the Kings River channel. KRCD is the FERC licensee for the 165-megawatt Jeff L. Taylor Pine Flat Hydroelectric Project, the license for which expires in 2029.

SFWPA is a California Irrigation District formed under California Water Code Division 11. SFWPA provides treated and raw water service to thousands of customers. SFWPA owns the 117-megawatt South Feather Power Project—consisting of eight dams, nine tunnels, twenty-one miles of canals and conduits, and four hydroelectric power plants—which is in the FERC relicensing process.

NWPPA is an electrical utility trade association formed in 1941, representing over 150 consumer-owned utilities in the western United States, Alaska,

and Canada. NWPPA is dedicated to serving the interests of its members and their millions of public electric utility customers. The central mission of consumer-owned utilities is to serve their communities with reliable and low-cost power on a not-for-profit basis. NWPPA has continuously been an advocate for public power on behalf of its member utilities.

NWHA is a non-profit trade association that represents and advocates on behalf of the Northwest hydroelectric industry. NWHA has approximately 130 members from all segments of the industry. NWHA is dedicated to the promotion of the Northwest region's waterpower as a clean, efficient energy source while protecting the fisheries and environmental quality that characterize the region.

MID and TID are California Irrigation Districts formed under California Water Code Division 11, which both provide electric and water services for their customers. MID and TID own and operate hydropower projects, including the Don Pedro Project and the La Grange Project. The Don Pedro Project is a 168-megawatt hydroelectric facility on the Tuolumne River in California's Tuolumne County, and the La Grange Project is a 4.7-megawatt hydroelectric project about two miles downstream, in Tuolumne and Stanislaus Counties. The Don Pedro Project and the La Grange Project are in the FERC licensing or relicensing process.

Rye is a leading developer of new low-impact hydropower energy generation and energy storage in the United States. Among other projects, Rye leads the development of the proposed Kentucky River Lock and Dam No. 11 Hydroelectric Project (Kentucky), Overton Lock and Dam Project (Louisiana), Enid Lake Hydroelectric Project (Mississippi), Beverly Lock and Dam Water Power Project (Ohio), Swan Lake Project (Oregon), Allegheny Lock and Dam 2 Hydroelectric Project (Pennsylvania), Goldendale Project (Washington), and Morgantown Lock and Dam Hydroelectric Project (West Virginia).

Snohomish is a Washington municipal corporation, formed by a majority vote of the people in 1936 for the purpose of providing electric and water utility service. Snohomish is the second largest consumer-owned utility in Washington and has experienced rapid growth within its service territory in recent years. Snohomish owns and operates several FERC-licensed hydropower projects, including the 112-megawatt Henry M. Jackson Hydroelectric Project. Snohomish has recently developed two run-of-the-river hydroelectric projects, which will generate enough clean energy annually to serve up to 10,000 homes.

Hydropower *Amici* share Petitioners' interest in ensuring that States comply with Section 401's one-year deadline, and regularly file amicus briefs in cases of importance to *Amici*, including cases involving Section 401. *See, e.g.*, Br. of Hydropower

Amici in Support of Pet'rs, *Turlock Irrigation Dist. v. FERC*, No.22-616 (U.S. Feb. 6, 2023); Br. of the Nat'l Hydropower Assoc., the Nw. Hydroelec. Assoc., Nw. RiverPartners & the Utility Water Act Grp. as *Amici Curiae* in Support of Pet'rs, *State Water Contractors v. Jewell*, No.14-402 (U.S. Nov. 5, 2014); Br. of Nat'l Hydropower Assoc., Nw. Hydroelec. Assoc., Am. Pub. Power Assoc., Sabine River Auth. of Tex., Sabine River Auth. State of La., and Oglethorpe Power Corp. as *Amicus Curiae* in Support of Defendant-Appellant-Cross Appellee U.S. EPA, *Catskill Mountains Ch. of Trout Unltd., Inc. v. EPA*, No.14-1823 (2d Cir. Sept. 18, 2014).

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 401 of the Clean Water Act establishes a one-year deadline for States to act on a hydropower project's request for a water quality certification. That certification is, in turn, a necessary step in the federal licensing process for hydropower projects, as a federal license cannot issue unless the State grants certification or waives its Section 401 certification authority. The Ninth Circuit's decision below undermines Section 401's express terms and deepens a circuit split. Under the Ninth Circuit's approach, States can effectively mandate that hydropower projects take part in a scheme where the applicants withdraw and resubmit their Section 401 water quality certification requests year after year, buying States as much time as they desire over the statutory

one-year limit, so long as States do not formalize that requirement in written contracts or directives.

The Courts of Appeals are divided on when a State's conduct is ineffective in extending Section 401's no-more-than-one-year time limit for State action through the use of a bilateral scheme that involves both the State and the Section 401 applicant. On one side of the split, the D.C. and Second Circuits have held that "a full year is the absolute maximum," *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019), *cert. denied sub nom. Cal. Trout v. Hoopa Valley Tribe*, 140 S. Ct. 650 (2019) (mem.), such that any coordinated arrangement between a State and a Section 401 applicant to expand the State's review period beyond the one year provided in the statute violates Section 401's clear terms. The Ninth and Fourth Circuits, by contrast, have held that coordinated arrangements of this sort are permissible unless the State formalizes those arrangements in a written agreement or directive. That distinction—whether a bilateral scheme undertaken at the State's demand is memorialized in a formal agreement or directive—has no basis in the statute's language or design.

The hydropower industry will suffer absent this Court's intervention and reversal of the Ninth Circuit's misguided approach. Hydropower is our Nation's most mature, low-cost, efficient, and reliable renewable energy resource, and Section 401's one-year rule is critical to ensuring the timeliness of

federal hydropower licensing. If States can draw out for years their Section 401 review processes through schemes of the type that the Ninth Circuit blessed by simply declining to reduce those schemes to explicit agreements or directives, these critical projects will be delayed for many years or even decades. That would have deeply negative consequences for the power grid's reliability, the goal of providing clean energy, and the well-being of local communities that rely on the hydropower industry for jobs.

This Court should grant the Petition.

ARGUMENT

I. The Circuits Are Divided Over When States May Engage In Bilateral Schemes To Buy Themselves More Time To Perform Their Section 401 Review

The Ninth Circuit's decision below deepens a split among the Courts of Appeals on the issue of when a bilateral scheme—that is, a scheme that involves actions by both the State and the requestor, working in tandem—is ineffective in evading the one-year limit found in Section 401 of the Clean Water Act.

1. The Federal Power Act ("FPA") gives FERC exclusive licensing authority over many hydropower projects, ensuring "a broad federal role in the development and licensing of hydroelectric power." *California v. FERC*, 495 U.S. 490, 496 (1990); *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 180–81

(1946); *see* 16 U.S.C. § 797(e). Under the FPA, FERC alone is responsible for issuing licenses authorizing the construction, operation, and maintenance of new and existing federal hydroelectric projects. 16 U.S.C. §§ 797(e), 808, 817. Congress enacted the FPA and its predecessor statute, the Federal Water Power Act of 1920, "to secure a comprehensive development of national resources," and the statute's "long and colorful legislative history" evidences "a vigorous determination of Congress to make progress with the development of the long idle water power resources of the nation" by creating "a complete scheme of national regulation." *First Iowa*, 328 U.S. at 171, 180–81.

States play an important, but deliberately time-limited, role in this FERC licensing process. States have the authority under Section 401 of the Clean Water Act ("CWA") to grant, grant with conditions, deny, or waive water quality certifications for any federally licensed or permitted activity that "may result in any discharge into the navigable waters" within the State's jurisdiction. 33 U.S.C. § 1341(a)(1). Federal hydropower projects must receive a water quality certification from each relevant State before FERC may issue a license unless the State waives its Section 401 certification authority. *Id.* ("No license or permit shall be granted until the certification required by this section has been obtained or has been waived[.]"). Hydropower projects must also obtain a new Section 401 certification prior to relicensing and for certain license amendments. *See S.D. Warren Co. v. Me. Bd. of Env'tl Prot.*, 547 U.S. 370, 374–75 (2006);

Ala. Rivers All. v. FERC, 325 F.3d 290, 292 (D.C. Cir. 2003). FERC is required to include any conditions contained in the State's Section 401 certification in the federal license. *See* 33 U.S.C. § 1341(d); *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 722 (1994); *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 110 (2d Cir. 1997).

Importantly for this case, Congress has imposed a strict one-year deadline for States to act on a Section 401 certification request: if 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 of this subsection shall be waived with respect to such Federal application." 33 U.S.C. § 1341(a)(1). This prevents States from "indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011); *see* 115 Cong. Rec. 9,264 (Apr. 16, 1969) (statement of Rep. Edmondson) (noting that a state's delay "could kill a proposed project just as effectively as an outright determination on the merits not to issue the required certificate").

Seeking to evade Section 401's one-year limit, States have devised various schemes that purport to afford a State more time to perform its water quality certification review. In the scheme at issue here, the State effectively requires an applicant to withdraw and then resubmit its application as the one-year

deadline approaches, "taking the position that the waiver clock starts anew with each resubmittal." Dierdre Duncan & Clare Ellis, *Clean Water Act Section 401: Balancing States' Rights and the Nation's Need for Energy Infrastructure*, 25 Hastings Env'tl L.J. 235, 244 (2019). Through the use of such bilateral schemes, as well as the unilateral denial-without-prejudice scheme at issue in a different Petition currently before this Court,[2] certain States have obstructed for years the federal licensing process for hydropower facilities; indeed, even though Section 401 imposes a maximum one-year time limit on state water quality certification review, "the most common cause of delayed hydropower licensing proceedings is untimely receipt of state water quality certification" under Section 401. Claudia Copeland, Cong. Res. Serv., *Clean Water Act Section 401: Background and Issues* 6 (July 2, 2015).[3] As noted by the D.C. Circuit in 2019, "twenty-seven of the forty-three licensing applications before FERC were awaiting a state's water quality certification, and four of those had been

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[2] In the denial-without-prejudice scheme, the State issues a pro-forma denial letter to the Section 401 applicant immediately before the one-year deadline expires, with an instruction that the requestor resubmit the same certification request if the requestor ever wants to obtain the required Section 401 certification. This unilateral scheme is at issue in a pending Petition for a Writ of Certiorari, where many of the Hydropower *Amici* here have also urged this Court's review. *See* Br. of Hydropower *Amici* in Support of Pet'rs, *Turlock Irrigation Dist. v. FERC*, No.22-616 (U.S. Feb. 6, 2023).

[3] Available at https://sgp.fas.org/misc/97-488.pdf.

pending for *more than a decade*." *Hoopa Valley*, 913 F.3d at 1104; *see also infra* Part III.

2. The Courts of Appeals are divided on when a State can use a bilateral scheme to give itself more than one year to decide a Section 401 certification request. On one side of the split, the D.C. Circuit and the Second Circuit have construed Section 401's plain language to hold that a State may not engage in a bilateral scheme with requestors to circumvent Section 401's one-year deadline. On the other side of the split, the Fourth Circuit and the Ninth Circuit have permitted such schemes to evade Section 401's time limit where the State has not memorialized the scheme in a written agreement or directive to the requestor.

In *Hoopa Valley*, the D.C. Circuit considered whether California and Oregon waived their Section 401 certification authority where those States "defer[red] review and agree[d] with a licensee to treat repeatedly withdrawn and resubmitted water quality certification requests as new requests." 913 F.3d at 1100–01. Specifically, the States engaged the licensee for years in a withdraw-and-resubmit arrangement before eventually entering into a formal, written agreement to continue to delay the States' water quality certification review beyond Section 401's one-year deadline. *Id.* at 1101. The Court held that this "coordinated withdrawal-and-resubmission scheme" was a legally ineffective "attempt to circumvent FERC's regulatory authority of whether

and when to issue a federal license." *Id.* at 1103. Because Section 401 provides States with one year to act on any "request for certification," 33 U.S.C. § 1341(a)(1), and because the licensee was not withdrawing its request in order to submit a wholly new request—but was instead merely submitting the very same certification request the State had before it the entire year before—the Court held that the arrangement constituted a waiver of the States' certification authority under Section 401, *Hoopa Valley*, 913 F.3d at 1104–05. Any other result would defy Section 401's clear one-year deadline and allow States to "indefinitely delay federal licensing proceedings," thus "undermin[ing] FERC's jurisdiction to regulate such matters." *Id.* at 1104.

The Second Circuit has similarly held that States' efforts to circumvent Section 401's one-year time limit through bilateral schemes are legally ineffective. In *New York State Department of Environmental Conservation v. FERC* ("*New York Dep't II*"), 991 F.3d 439 (2d Cir. 2021), the Court considered an agreement between the State and a Section 401 applicant that had the "effect of extending the deadline for the [State] to issue or deny water quality certification by 36 days." *Id.* at 443. Reviewing Section 401's text and legislative history, the Second Circuit explained that "Congress could not have intended to permit the arrangement," which arrangement "introduce[d] the uncertainty the one-year limitation period was intended to eliminate." *Id.* at 450. Congress adopted the one-year deadline to "protect[ ] the overall federal

licensing regime," such that the deadline may not be manipulated by States or applicants in order to buy the State more time to review a water quality certification application. *Id.* at 449–50; *see also N.Y. State Dep't of Env'tl Conservation v. FERC*, 884 F.3d 450, 455 (2d Cir. 2018) ("*New York Dep't I*") (a State may not defer the start date of its review process until a request is, in the State's discretion, "complete," as that would allow States to indefinitely evade Section 401's one-year deadline).

Although both *Hoopa Valley* and *New York Department II* (eventually) involved formal agreements between the State and the applicant to extend the State's review period beyond Section 401's time limit, neither the D.C. Circuit nor the Second Circuit grounded their reasoning on the existence of a formal agreement or directive. Rather, in *Hoopa Valley*, the D.C. Circuit considered a decades-long scheme consisting of both informal and formal withdraw-and-submit arrangements, and interpreted the plain text of Section 401 to prohibit States from devising *any* "arrangement[s]" that "circumvent a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project." 913 F.3d at 1104–05. Similarly, in *New York Department II*, the Second Circuit invalidated any "arrangement" that would "introduce[ ] the uncertainty [Section 401's] one-year limitation period was intended to eliminate." 991 F.3d at 449.

The Ninth and Fourth Circuits, on the other hand, have permitted bilateral schemes to extend Section 401's one-year review period, narrowing any prohibition to written agreements or directives.

In the Ninth Circuit decision below, the Court considered a situation where the State obviously mandated a withdraw-and-resubmit scheme by setting up a state regulatory regime that would take more than one year to navigate and then requiring requestors to withdraw and resubmit their Section 401 requests in not-so-subtle correspondence. *See* App.10a–18a. The case below involved three different requestors, but the fact pattern for each was the same in all material respects: immediately prior to Section 401's one-year deadline, the State strongly urged the petitioners to withdraw and resubmit their applications to buy the State more time. For instance, petitioner Merced Irrigation District applied to FERC for new licenses for two hydropower projects and, in accordance with the CWA, filed a request with the State for water quality certifications on May 20 and May 21, 2014. App.15a–16a. On April 21, 2015, one month before the Section 401 deadline would expire, the State emailed Merced:

> Merced Irrigation District's application for water quality certification for the Merced River Hydroelectric Project, FERC Project No. 2179[,] expires on May 21, 2015. Please withdraw . . . and simultaneously resubmit an

> application for water quality certification prior to May 13, 2015.

App.16a (first alteration in original). Petitioner Yuba County Water Agency received a similar email, shortly before the review period for its Section 401 application was set to end:

> [Yuba's] water quality certification action date for the Yuba River Development Project (FERC No. 2246) is August 24, 2018. A final [California Environmental Quality Act] document for the Project has not been filed; therefore, the State Water Board cannot complete the environmental analysis of the Project that is required for certification.
>
> Please submit a withdraw/resubmit of the certification application as soon as possible.

App.14a.

The Ninth Circuit held this obvious withdraw-and-resubmit scheme was legally effective in evading Section 401's one-year deadline. Although the Court ostensibly based its decision on a purported lack of evidence showing that the State itself prompted applicants to withdraw their applications, App.22a, the undisputed evidence demonstrated a well-established practice of instructing Section 401 applicants to withdraw and resubmit their requests for water quality certification. *See* App.22a. The

Ninth Circuit itself acknowledged that the California Water Resources Control Board codified this practice in its regulations. *See* App.27a–28a. Thus, the Ninth Circuit effectively requires that States issue some formal withdraw-and-resubmit directive to certification applicants before running afoul of Section 401. App.22a–30a. This decision is starkly opposed to the D.C. Circuit's ruling in *Hoopa Valley* that "a full year is the absolute maximum" for a State's Section 401 certification review. 913 F.3d at 1104. It also renders any prohibition on bilateral schemes to evade Section 401's one-year rule an effective nullity in the Ninth Circuit, given that applicants have no choice but to comply with a State's not-so-subtle "suggestion" to withdraw and resubmit a Section 401 request, as they cannot complete the federal licensing process without obtaining a water quality certification (or a waiver) from the State.

The Fourth Circuit has taken a similar approach to the Ninth Circuit, rendering any prohibition on the withdraw-and-resubmit scheme a nullity in that Circuit as well. In *North Carolina Department of Environmental Quality v. FERC* ("*NCDEQ*"), 3 F.4th 655 (4th Cir. 2021), the Fourth Circuit blessed a state agency's effort to extend its time to act on a water quality certification application through a withdraw-and-resubmit scheme. After the Section 401 applicant in that case had already once refiled its certification application, the state agency informed the applicant that it would be unable to complete the certification process within one year, and the

applicant thereafter withdrew and resubmitted the very same application at the State's not-so-subtle suggestion. *Id.* at 662–63. The Fourth Circuit determined that the State's actions were effective in extending Section 401's one-year deadline because, in the Court's view, the State "merely answered questions and reminded [the applicant] of the time frame if it intended to proceed," with the applicant itself "initiat[ing] the withdrawals and resubmissions." *Id.* at 672–73. So while the Fourth Circuit attempted to square its holding with *Hoopa Valley* because the States and applicants in that case "entered into a written agreement that obligated the state agencies, year after year, to take no action at all on the applicant's § 401 certification request," *id.* at 669 (emphasis omitted), that was an implausibly narrow reading of *Hoopa Valley*. As noted above, the key inquiry in *Hoopa Valley* was whether the State had taken part in a withdraw-and-resubmit scheme, not whether that scheme was in a written form. *Hoopa Valley*, 913 F.3d at 1105.

II. By Engaging In Bilateral Schemes To Prolong Water Quality Certification Review, States Unlawfully Evade Section 401's One-Year Rule

When a State seeks to provide itself more time than one year to complete Section 401's water quality certification process through a bilateral scheme like the one at issue here, that is a legally ineffective attempt to evade Section 401's bright-line, one-year rule. Whether there is any formal agreement between

the State and applicant or a formal directive from the State is legally irrelevant. The plain text and design of the statute, as well as its history, demonstrate as much. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020); Br. of Pet'rs at 29–31.

The meaning of Section 401's text is plain: a State has "a reasonable period of time (which shall not exceed one year)" to act on a "request for certification," and where the State "fails or refuses to act on a request" within that year, "the certification requirements of this subsection shall be waived with respect to such Federal application." 33 U.S.C. § 1341(a)(1); *Hoopa Valley*, 913 F.3d at 1103 (explaining that "Section 401's text is clear"). "[T]he plain language of Section 401 outlines a bright-line rule" that "the timeline for a state's action regarding a request for certification 'shall not exceed one year' after 'receipt of such request.'" *New York Dep't II*, 991 F.3d at 447 (citation omitted). The "temporal element imposed by the statute is 'within a reasonable period of time,' followed by the conditional parenthetical, '(which shall not exceed one year),'" which language indicates that waiver may be found "prior to the passage of a full year." *Hoopa Valley*, 913 F.3d at 1103–04 (quoting 33 U.S.C. § 1341(a)(1)). And, when given its ordinary meaning, the term "refuse" means "[t]o decline to do something," or "to express or show determination not to do something." *Refuse*, Oxford

English Dictionary.[4] When a State establishes any practice that seeks to give the State more than one year to decide on a request for water quality certification, the State violates Section 401's clear one-year deadline.

Any other reading of Section 401 would lead to "absurd results." *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). If a State can mandate that Section 401 applicants withdraw and resubmit their applications as the one-year deadline approaches, it can also use Section 401 "to hold federal licensing hostage." *Hoopa Valley*, 913 F.3d at 1104. That is true where States and applicants enter formal agreements to delay federal licensing proceedings, *id.* at 1101; *New York Dep't II*, 991 F.3d at 443, and where the State not-so-subtly instructs or urges applicants to withdraw and resubmit their Section 401 applications prior to the State's one-year deadline, like in the communications here, App.10a–18a; *NCDEQ*, 3 F.4th at 672–73. The statutory language nowhere suggests that a State's efforts to evade Section 401's express deadline are permissible so long as the State strategically evades formalizing the arrangement or directive in writing.

Section 401's legislative history, to the extent this Court considers that relevant here, *see Delaware v. Pennsylvania*, 598 U.S. ___, 2023 WL 2247231, at *12

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[4] Available at https://www.oed.com/view/Entry/161141?rskey=ks6g88&result=3&isAdvanced=false#eid.

(2023), is in accord. Congress enacted Section 401's one-year deadline to prevent a State's "dalliance or unreasonable delay." 115 Cong. Rec. 9,264 (Apr. 16, 1969) (statement of Rep. Edmondson). Congress viewed that clear time limit as necessary "to insure that sheer inactivity by the State . . . will not frustrate the federal application." H.R. Rep. No. 91-940, at 55 (Mar. 24, 1970) (Conf. Rep.), *reprinted in* 1970 U.S.C.C.A.N. 2712, 2741. In "imposing a one-year time limit on States to 'act,' Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request," *Alcoa Power*, 643 F.3d at 972, such that *any* state-sanctioned circumvention of Section 401's one-year deadline is unlawful, regardless of whether the State has entered into any formal agreement to delay federal licensing proceedings. The scheme that the Fourth Circuit and the Ninth Circuit have blessed thus subverts Congress's core design that a State's water rights authority under the CWA not be allowed to unduly delay a federal licensing regime.

III. States' Efforts To Undermine Section 401's One-Year Deadline Harm The Hydropower Industry And The Nation's Supply Of Electric Energy

When States circumvent Section 401's one-year deadline, the hydropower industry suffers, as do the Nation's supply of clean, emissions-free energy and electric consumers who rely on this affordable and reliable form of baseload renewable energy.

Hydropower provides the "oldest, most abundant, and most efficient renewable energy source in the United States." Andrew G. Lawson, *Streamlining the Hydropower Licensing Process: What's up with the Dam Licensing*, 52 Suffolk U. L. Rev. 109, 111 (2019). With a conversion rate of 90%, hydropower is significantly more efficient—not to mention more affordable—than other energy sources. *Id.* at 112; U.S. Dep't of Energy, Off. of Energy Efficiency & Renewable Energy, *Hydropower Basics*.[5] Hydropower projects account for roughly 7% of the total national electric production, and hydropower accounts for over one-third of the nation's renewable energy. U.S. Energy Info. Admin., *Frequently Asked Questions, What Is U.S. Electricity Generation by Source*.[6] In addition to electric production, hydropower offers significant benefits for the Nation's electric grid: because hydropower plants can reliably generate power to the grid immediately, these facilities are vital to ensuring the country's power system can withstand severe disturbances such as hurricanes and other extreme events. U.S. Dep't of Energy, Hydropower's Contributions to Grid Resilience at v (Oct. 2021).[7] And the importance of

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[5] Available at https://www.energy.gov/eere/water/hydropower-basics.

[6] Available at https://www.eia.gov/tools/faqs/faq.php?id=427&t=3.

[7] Available at https://www.pnnl.gov/main/publications/external/technical_reports/PNNL-30554.pdf.

hydropower is only likely to increase as the United States works to address climate change impacts and reduce its dependence on fossil fuels. The U.S. Department of Energy has estimated that hydropower capacity in the United States could grow 50% by 2050, from 101 gigawatts to nearly 150 gigawatts. U.S. Dep't of Energy, Hydropower Vision: A New Chapter for America's 1st Renewable Electricity Source 373 (2016).[8]

Hydropower projects also provide significant benefits for the communities in which they are located. They contribute to municipal and industrial water supply, navigation, flood control, irrigation, recreation, and fish and wildlife habitat. U.S. Dep't of Energy, Off. of Energy Efficiency & Renewable Energy, *Benefits of Hydropower*.[9] The hydropower industry further benefits local economies by employing tens of thousands of people, with the hydropower workforce estimated to grow to up to 120,000 jobs by 2030 and up to 158,000 jobs by 2050. U.S. Dep't of Energy, Nat'l Renewable Energy Lab.,

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[8] Available at http://energy.gov/sites/prod/files/2016/10/f33/Hydropower-Vision-10262016_0.pdf.

[9] Available at https://www.energy.gov/eere/water/benefits-hydropower.

Workforce Development for U.S. Hydropower: Key Trends and Findings at 6, 17 (July 2019).[10]

State abuse of the Section 401 certification process is a frequent source of delay in hydropower licensing and relicensing, contributing to the underutilization of this important renewable energy source. As a former FERC Chairman has noted, "the [S]ection 401 certification process is often very time-consuming, despite the intent of the CWA that a State should act on a certification request in a year or less." S. Hrg. 105-381, 105th Cong. 55 (1997) (statement of James J. Hoecker, FERC Chairman). A FERC staff report released in 2017 indicates that States flout Section 401's one-year deadline frequently, such that a Section 401 water quality certification takes an average of 411 days, *see* Staff of Fed. Energy Regulatory Comm'n, AD13-9-000, Report on the Pilot Two-Year Hydroelectric Licensing Process for Non-Powered Dams and Closed-Loop Pumped Storage Projects and Recommendations 41–42 (2017),[11] with many States taking a decade or more to complete their certifications, *Hoopa Valley*, 913 F.3d at 1104.

The chronic delay caused by States' circumvention of Section 401's one-year deadline—including through the withdraw-and-resubmit tactics at issue in this

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[10] Available at https://www.nrel.gov/docs/fy19osti/74313.pdf.

[11] Available at https://www.ferc.gov/sites/default/files/2020-05/final-2-year-process.pdf.

case—undermines the national interest in preserving and promoting this vital and irreplaceable renewable energy resource. Regulatory clarity is critical for hydropower development, as uncertainty in licensing processes can "adversely affect development costs, timelines, and financing options." Hydropower Vision, *supra*, at 51. Hydropower projects generally require numerous permits and reviews at the federal, state, and local levels, which process in turn requires precise planning and scheduling to ensure a project stays on track for regulatory permitting, financing, and ultimate development. For new projects, any unanticipated delays can sound a death knell. *See Alcoa*, 643 F.3d at 970 ("[S]ignificant capital investments cannot be made in hydro power projects without the certainty and security of a multi-decade license."). And for existing hydropower facilities seeking relicensing, delays in the certification process can prevent these facilities from implementing proposed environmental improvements.

When States evade Section 401's one-year deadline, they threaten our Nation's efforts to reduce dependence on carbon-based sources of energy. Hydropower is critical to sustaining a decarbonized energy grid, *see* James H. Williams et al., Energy & Env'tl Economics, Inc. et al., Pathways to Deep Decarbonization in the United States, US 2050 Report, Volume 1: Technical Report 17–20 (2014),[12]

[12] Available at https://biotech.law.lsu.edu/blog/US-Deep-Decarbonization-Report.pdf.

and "additional hydropower development above current levels that meets modern environmental requirements must be a component of any proposal to reduce the United States' dependence on carbon over the long term," Charles R. Sensiba, Michael A. Swiger, & Sharon L. White, *Deep Decarbonization and Hydropower*, 48 Env'tl L. Rep. 10309, 10310 (2018).[13] But that development is only possible if States are held to the clear terms of Section 401, and thus are prohibited from taking the federal hydropower licensing process hostage.

In contrast, when States comply with Section 401's terms, hydropower projects can move through the licensing and relicensing process more efficiently, which means more jobs, less carbon dependence, and a more reliable and resilient electric grid. To realize the immense benefits associated with hydropower, it is critical that this Court invalidate the withdraw-and-resubmit practice sanctioned by the Ninth Circuit and enforce Section 401's bright-line time limit for State water quality certification review.

[13] Available at https://www.vnf.com/webfiles/48.10309.pdf.

CONCLUSION

This Court should grant the Petition.

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