ORAL ARGUMENT NOT YET SCHEDULED

Nos. 20-72432, 20-72452, 20-72782, 20-72800, 20-72958, 20-72973

In the United States Court of Appeals for the Ninth Circuit

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

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT,

NEVADA IRRIGATION DISTRICT, *ET AL.*,
RESPONDENT-INTERVENORS.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT FERC

Andrew R. Varcoe
Stephanie A. Maloney
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Jonathan D. Brightbill
Lauren Gailey
WINSTON & STRAWN LLP
1901 L Street, NW
Washington, DC 20036
(202) 282-5000
(202) 282-5100 ~ Fax
jbrightbill@winston.com
lgailey@winston.com

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the Chamber of Commerce of the United States of America (Chamber) states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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GLOSSARY

This glossary is included for the Court's convenience, as the acronyms appear throughout the record.

ACRONYM	DEFINITION
CEQA	California Environmental Quality Act
CWA	Clean Water Act
DEC	Department of Environmental Conservation
DEQ	Department of Environmental Quality
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
FERC	Federal Energy Regulatory Commission
FWPCA	Federal Water Pollution Control Act
NEPA	National Environmental Policy Act of 1969
NPDES	National Pollutant Discharge Elimination System

INTEREST OF *AMICUS CURIAE*

Amicus curiae the Chamber of Commerce of the United States of America (Chamber) files this brief in support of Respondent Federal Energy Regulatory Commission (FERC) and Respondents-Intervenors Nevada Irrigation District, Merced Irrigation District, and Yuba County Water Agency.[1]

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

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[1] This brief was submitted with a motion for leave to file pursuant to Federal Rule of Appellate Procedure 29(a). *Amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

Many of the Chamber's members are involved in building, maintaining, and improving the nation's infrastructure in a wide variety of industries, including construction, transportation, and power generation. Because many of these infrastructure projects—which benefit both industry and the general public—require federal licenses or permits, the Chamber has a keen interest in protecting the federal government's authority to timely license or permit these activities. The recent passage of the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021), reinforces the importance of timely federal permitting and licensing. Without a timely infrastructure permitting system, the investments authorized by the Act will not be realized.

The question presented here is of vital importance to the Chamber. It implicates a statutory provision that is sometimes improperly invoked to delay federal permitting and licensing decisions: Section 401 of the Clean Water Act (CWA). This provision affords states a limited opportunity to make a certification decision concerning projects that could affect water quality. Despite the time limit on state decisionmaking in Section 401, it has become "commonplace for states to

use Section 401 to hold federal licensing hostage." *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1104 (D.C. Cir. 2019). Enforcing Congress's boundaries on state action under Section 401 is essential to preventing unreasonable and indefinite delay of licenses and permits that can provide significant benefits for commerce, for our economy, and for the environment.

Given the breadth of the Chamber's membership—which includes many past, current, and future applicants for federal licenses and permits, in a wide range of economic sectors and regulatory contexts—the Chamber has a unique perspective on this question, with a substantial interest in ensuring that the CWA is interpreted consistent with Congress's design. The Chamber has participated in many other cases addressing the scope of agency and state authority under the CWA and other environmental and regulatory statutes. *See, e.g.*, *Const. Pipeline Co. v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87 (2d Cir. 2017) (Section 401); *see also, e.g.*, *Gen. Motors Corp. v. United States*, 496 U.S. 530 (1990) (EPA's statutory authority); *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012) (same).

INTRODUCTION

Efficient federal licensing and permitting critically impact infrastructure and economic development. A timely, predictable process helps attract private investment in infrastructure projects. It can reduce project costs. It can improve environmental outcomes and project delivery. And it can enhance economic growth and public welfare.

Section 401 is unlike other provisions of the CWA. Its primary object, commands, and grant of legal authority are *not* directed to the Administrator of the Environmental Protection Agency (EPA). It gives EPA various secondary and supporting responsibilities for implementing the provision. But Congress directs Section 401 primarily to the various "licensing or permitting agenc[ies]" of the federal government. Congress created many such agencies to help regulate commerce. It bestowed upon certain such agencies *exclusive* authority to license or grant permits for commercial activity.

One such agency is Respondent FERC. Under the Federal Power Act, FERC has exclusive authority to license nonfederal hydroelectric power generation on navigable waterways. 16 U.S.C. §§ 791(a)-825. Congress determined that FERC's exclusive jurisdiction most effectively

regulates this subject of interstate commerce and best advances the general welfare of the nation. Congress's decision to give such authority to FERC was motivated, in part, by a desire to mitigate potential self-dealing or other action by states advancing local interests at the expense of the nation. *See United States v. Pub. Util. Comm'n*, 345 U.S. 295, 318 (1953) (reversing California agency's assertion of jurisdiction over certain sales of electric power used in Nevada).

The express textual limits of CWA Section 401 accommodate and further these and other federal licensing and permitting policies. Section 401 does not grant states a sovereign "right." It provides states with a limited, defined *opportunity* to participate in certain federal licensing and permitting processes. Section 401 provides that states, in certain circumstances, may give, or deny, a certification that a proposed federally licensed activity will comply with applicable water quality standards. *See* 33 U.S.C. § 1341(a). But Section 401 does not *require* such a certification. For 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 [Section 401(a)] shall be waived." *Id.* (emphasis added). Strikingly,

under Section 401, even such an environmental review by the "Administrator" of EPA (who performs such a review in certain cases) "shall be waived" if not completed within this one-year cutoff. *Id.*

Petitioners do not dispute that the California State Water Resources Control Board ("California") took more than a year to dispose of the certification requests at issue in this case. Applying the plain language of the waiver provision, as interpreted by a unanimous D.C. Circuit panel in *Hoopa Valley Tribe v. FERC*, FERC reasonably determined that California had waived its opportunity to grant or deny a certification. California instead, at minimum, stood by as the applicant withdrew, then resubmitted, materially the same applications year after year. This Court should follow the holding and logic of the D.C. Circuit's decision in *Hoopa Valley*.

By directing that certification reviews "shall not exceed one year"—with even EPA subject to this time bar—Congress clearly expressed its paramount concern for the continued, prompt conduct of federal licensing and permitting. Agencies of the federal government already consider the environmental impact of their major actions through complying with the National Environmental Policy Act of 1969 (NEPA). 42 U.S.C. § 4332.

This preceded Congress's enactment of the narrow, specific backstop in CWA Section 401 in 1972. Congress's clear limits on the opportunity of states, interstate agencies, and even EPA to advance these additional considerations must be respected. Protecting federal agency authority to diligently act on applications for federal licenses and permits is critical to continued infrastructure development and commerce.

ARGUMENT

I. In Section 401 of the CWA, Congress placed a clear deadline on states—and even EPA—to constrain their ability to delay federal licensing and permitting.

Since 1935, the federal government has required a license to operate a hydroelectric power plant. Public Utility Holding Company Act of 1935, § 210(b), 49 Stat. 803, 846. In the Federal Power Act, Congress delegated to FERC (formerly the Federal Power Commission) the exclusive authority to grant licenses to build and operate nonfederal hydroelectric facilities on navigable waters. *See Pub. Util. Comm'n*, 345 U.S. at 318. Pursuant to the Act, FERC may "issue licenses for projects 'necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over

which Congress has jurisdiction.'" *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 722 (1994) (quoting 16 U.S.C. § 797(e)).

FERC may grant a license to operate a hydroelectric plant for a maximum of 50 years after assessing public need for a hydroelectric project—and after considering any environmental issues associated with it. 16 U.S.C. §§ 797(e), 799, 803(a)(1). FERC also conducts its own environmental reviews, as required by statutes such as NEPA. *See* 42 U.S.C. § 4332(2)(C) (requiring a "detailed [environmental impact] statement" on "major Federal actions significantly affecting the quality of the human environment").

A. Section 401 prioritizes timely exercise of federal licensing authority over state certification.

Another environmental statute implicated by the FERC licensing process is the CWA. The CWA—initially enacted in 1948 as the Federal Water Pollution Control Act and amended to much of its current form in 1972—regulates discharges to navigable waters. Pub. L. No. 92-500, 86 Stat. 816, *codified at* 33 U.S.C. §§ 1251–1388. Because "operating a dam to produce hydroelectricity 'may result in any discharge into the navigable waters' of the United States," *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 373 (2006), "the threshold condition, the

existence of a discharge, is satisfied," and the CWA applies. *PUD No. 1*, 511 U.S. at 712.

1. The text of Section 401 allows states no more than one year to make certification decisions.

Section 401 requires "[a]ny applicant for a Federal license or permit to conduct any activity including . . . the construction or operation of facilities[] which may result in any discharge into the navigable waters" to "provide the licensing or permitting agency"—here, FERC—"a certification from the State in which the discharge originates . . . or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates . . . , that any such discharge will comply with [certain] applicable provisions" of the CWA. 33 U.S.C. § 1341(a)(1). Section 401 further requires that, among other things, the state or interstate agency "establish procedures for public notice" of all applications and "hearings in connection with specific applications." *Id.*

Once FERC issues a notice that the license application is complete and ready for FERC's environmental review under NEPA, the project applicant must, "no later than 60 days" from the notice, initiate the certification process outlined in Section 401 of the CWA. 18 C.F.R.

§§ 5.18(b)(3)(i), 5.23(b). This submission starts a one-year clock. *Id.* § 5.23(b)(2).

The statute recognizes the possibility that "a State or interstate agency has no authority to give such a certification." 33 U.S.C. § 1341(a)(1). In that case, "such certification shall be from the Administrator" of EPA. *Id.* Critically, "[i]f the State, interstate agency, or Administrator, as the case may be, *fails or refuses to act* on a request for certification, *within a reasonable period of time (which shall not exceed one year)* after receipt of such request, the certification requirements of this subsection *shall be waived* with respect to such Federal application." *Id.* (emphases added). "No license or permit shall be granted until the certification . . . has been obtained or has been waived as provided in the preceding sentence." *Id.*

2. Reading Section 401 in context confirms Congress's intent to keep the federal processes moving.

Section 401 facially prioritizes timely action for federal agencies by imposing clear temporal limits on state (and even EPA) water-quality certification reviews. The broader context of Section 401 further confirms

Congress's intent. The statute prioritizes the progress of federal licensing and permitting applications in three ways.

First, the one-year deadline is expressed as a nondiscretionary limit on certification authority. It "does not merely 'spur' the [state or interstate or federal] agency to action, but it bars untimely action by depriving the agency of its authority after the prescribed time limit." *N.Y. State Dep't of Envtl. Conservation v. FERC* (*New York II*), 991 F.3d 439, 447 (2d Cir. 2021). "Once the Clean Water Act's requirements have been waived, the Act falls out of the equation." *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696, 700 (D.C. Cir. 2017).

Indeed, by providing for "a *reasonable period* of time (which *shall not exceed* one year)," Congress granted federal agencies the authority to determine that waiver should be found *even before* a one-year mark. *See* 33 U.S.C. § 1341(a)(1) (emphases added). For example, EPA "generally finds a state's waiver after only six months." *Hoopa Valley*, 913 F.3d at 1104 (citing 40 C.F.R. § 121.16). Against this grant of discretion to move more quickly, the statute establishes the one-year limit as a hard deadline for certification. This is the "absolute maximum" amount of time allowed. *Id.*

Second, even EPA's Administrator is subject to this strict one-year time bar and consequent waiver. By so directing, Congress expressed a clear intent that the continued timely conduct of federal licensing and permitting processes is paramount. Such processes may be held up only if an affirmative determination is made "within a reasonable period of time (which shall not exceed one year)" to deny the certification on account of water quality impacts. *See* 33 U.S.C. § 1341(a)(1).

Third, the context makes clear that the "act" that Congress demands to avoid the one-year bar is a final decision "to give" or to have "denied" such a certification. *See id.* Petitioners suggest that any state action or statement will suffice to avoid a waiver. *See, e.g.*, Env. Br. 23–27. That makes no sense. The sentences immediately before and after the sentence containing the "refuses to act" passage (within the fifth sentence of Section 401(a)(1)) confirm this.

The sentence preceding this passage (the fourth sentence of Section 401(a)(1)) explains what happens when states cannot "give such a certification": i.e., it "shall be [given] from the Administrator." 33 U.S.C. § 1341(a)(1). And then in the "refuses to act" sentence—the clause directing waiver—Congress authorizes that "[i]f the State, interstate

agency, *or Administrator*, as the case may be, fails or refuses to act on a request for certification" within the deadline, "the certification requirements of this subsection shall be waived." *Id.* (emphasis added). The only prior place in Section 401 in which the Administrator is mentioned is in the fourth sentence of Section 401(a)(1), as noted above. This sentence authorizes "the Administrator" to "*give such a certification*." *Id.* (emphasis added). Thus, the "act" that Congress is requiring immediately thereafter in the fifth sentence is plainly the "giv[ing of]"—or, if legally appropriate, the denial of—"such a certification" to which Congress just previously referred. *See id.*

More context confirming the character of the "act" being demanded comes in the sixth and seventh sentences of Section 401(a)(1). The sixth sentence provides that no license or permit shall be granted until a certification has been "obtained or . . . waived as provided in the preceding sentence." The seventh (and final) sentence of Section 401(a)(1) provides that no license or permit shall be granted if "certification has been denied." *Id.*

Taken together, when the word "act" is read in the full context of these sentences regarding who can "give" certifications, from whom they

can be "obtained" or else "waived," and what happens if "certification has been denied," the "act" demanded to avoid waiver is plain. There are three permissible options: give, deny, or waive the certification. Notably, the Fourth Circuit, which expressed "reservations about [this] reading of the statute" in dicta, grappled with none of this. *N.C. Dep't of Envtl. Quality v. FERC*, 3 F.4th 655, 671 (4th Cir. 2021) (*North Carolina DEQ*). The considered holdings of the other two circuits are more persuasive.

Moreover, FERC's own regulations reflect this plain reading. Those regulations have specified since 1987 that a state has one year from receipt to "den[y] or grant[] certification." 18 C.F.R. § 4.34(b)(5)(iii) (2019) (originally codified in substantially similar form at 18 C.F.R. § 4.38(e)(2) (1987)).

This Court can "begin" and "can end" its "search for Congress's intent with the text and structure of" Section 401. *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001). Here, if the "act" that avoids waiver is anything other than the final decision to give or deny certification, Congress's clear design is frustrated. An agency has discretion to find waiver "within a reasonable period of time," but is mandated that such a certification decision "not exceed one year." Petitioners offer no

satisfactory explanation why this one-year limit exists at all if it is so easily rendered nugatory by mere administrative acts short of grant or denial.

B. Congress added the one-year maximum limit to prevent states from holding up the licensing process.

As the D.C. Circuit put it, "the purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011). Not only is this "clear from the plain text" (*id.*), the Second Circuit has also recognized that "[t]he legislative background of Section 401 . . . shows with a good deal of clarity that limiting a certifying state's discretion and eliminating a potential source of regulatory abuse was what the one-year limit . . . was intended to achieve." *New York II*, 991 F.3d at 448.

The original House Bill proposing Section 401 did not set a deadline for state certification. H.R. Rep. No. 91-127, at 42–43 (1969). But in response to concerns that a state could "sit on its hands and do nothing" at the expense of other states involved in a multi-state project, the House added the words "within a reasonable period of time." *New York II*, 991

F.3d at 448 (quoting 91 Cong. Rec. H2690 (daily ed. Apr. 16, 1969)). This phrase "guard[s] against" one state "delay[ing] or otherwise upset[ting]" the proceedings "due to a . . . 'passive refusal or failure to act.'" *Id.*

Moreover, the one-year limit was a refinement added after the House and Senate versions of the bill were combined. *Id.* During the debate, members noted that "there [we]re not any real safeguards in the bill to protect an applicant against arbitrary action by a State agency." 91 Cong. Rec. H2691. The conciliation committee emphasized the need to avoid such delays impacting the federal agency's licensing process. It explained that the one-year time limit would "insure that sheer inactivity by the State, interstate agency, or Secretary, as the case may be, *will not frustrate the Federal application*." H.R. Rep. No. 91-940, at 55 (1970) (emphasis added). "Such frustration would occur if the State's inaction, or incomplete action, were to cause the federal agency to delay its licensing proceeding." *Alcoa Power*, 643 F.3d at 972.

In an attempt to distinguish the facts at hand, Petitioners and State *Amici* seize on the words "sheer inactivity"—as if those words appeared in the actual statute. *See, e.g.*, Env. Br. 25; Cal. Br. 52; State *Amici* Br. 8. But they ignore the significance of the broader federal licensing

process. Their "tak[ing] a few words from their context" within the statute and legislative history does "not contribute greatly to the discovery of the purpose of the draftsmen of a statute." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). Properly read in context, as the Second Circuit did, Congress's intent becomes clear: "Section 401's time limit was meant to protect *the regulatory structure*," not the "rights of individual applicants," the environment, or the states' opportunity to certify. *New York II*, 991 F.3d at 448 (emphasis added).

Indeed, the role that Congress has given states in federal licensing processes is even more limited than Respondent FERC's brief may be read to suggest. *See* FERC Br. 6–8. The "primary purpose" of the provision is not "preserv[ing] States' authority." Cal. Br. 50. Indeed, a state's exercise of Section 401 certification authority "is not a sovereign state right." *Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 93 (2d Cir. 2006). "Rather, Congress has the authority to regulate discharges into navigable waters under the Commerce Clause, and the State, in this case, exercises only such authority as has been delegated by Congress." *Id.* By restricting that authority to a one-year window, "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.

II. *Hoopa Valley*'s straightforward approach to finding waiver under Section 401 best reflects Congress's decision to prioritize continued progress of federal licensing and permitting.

The D.C. Circuit in *Hoopa Valley* correctly read and applied the waiver provision of Section 401. That decision logically effectuates the provision's purpose to grant an opportunity to contribute to an agency's environmental reviews, without unduly delaying federal licensing. The Second Circuit in *New York II* and FERC in this case similarly recognize that purpose.

This Court should decline Petitioners' and State *Amici*'s invitation to read *Hoopa Valley* "narrow[ly]" (State *Amici* Br. 16), or to confine it to purportedly "unique facts" (Cal. Br. 16). *Hoopa Valley* was a statutory interpretation case. It is not a factbound inquiry turning on the specifics of a particular FERC order. It confirmed a bright-line rule: neither a state, nor EPA, nor even FERC may delay a federal application for more than a year after receipt of a Section 401 certification request.

A. Courts of appeals have properly recognized that allowing Section 401's deadline to be "tolled" frustrates Congress's intent.

In *Hoopa Valley*, a company wanting to decommission hydroelectric dams requested certification from California and Oregon under Section 401 in 2006. 913 F.3d at 1101, 1104. Four years later, the company entered into an agreement with the states and other stakeholders to "defer the one-year statutory limit for Section 401 approval by annually withdrawing-and-resubmitting the water quality certification requests" for 10 years. *Id.* at 1101–02. A Native American tribe unsuccessfully petitioned FERC for a declaration that the states had waived their Section 401 authority. *Id.* at 1102. The tribe then petitioned for review of FERC's decision in the D.C. Circuit.

As Judge Sentelle (joined by Judges Griffith and Pillard) explained, "[d]etermining the effectiveness of [the] withdrawal-and-resubmission scheme is an undemanding inquiry because Section 401's text is clear." *Id.* at 1103. 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)." *Id.* at 1103–04 (quoting 33 U.S.C.

§ 1341(a)(1)). And "[t]he pendency of the requests for state certification in this case has far exceeded the one-year maximum." *Id.* at 1104.

The court deemed "arbitrar[y] and capricious[]" FERC's construal in that case of each annual resubmission of "the same one-page letter" as "an independent request[] subject to a new period of review." *Id.* This "arrangement . . . serves to circumvent a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project," effectively allowing "states to use Section 401 to hold federal licensing hostage." *Id.* The court emphasized that "Congress intended Section 401 to curb a state's 'dalliance or unreasonable delay.'" *Id.* Congress "repeatedly recognized that the waiver provision was created 'to prevent a State from indefinitely delaying a federal licensing proceeding.'" *Id.* at 1104–05 (quoting 115 Cong. Rec. 9264 (1969) and *Alcoa Power*, 643 F.3d at 972–73).

The lesson of *Hoopa Valley* is that neither a state nor a federal agency may delay a federal application process because an applicant purports to "withdraw" and "resubmit" a Section 401 application. Where, as here, "[t]he record does not indicate that [applicant] withdrew its request and submitted a wholly new one in its place" before one year

elapsed, that doesn't "restart[] the one-year clock." *Id.* at 1104. Nothing about this rule is "narrow," much less "very narrow." State *Amici* Br. 10. Nor is it limited to *Hoopa Valley*'s "unique factual setting." Cal. Br. 54. Instead, the court was well aware of the broad implications of its statutory construction holding. The court expressly declined to decide its outer bounds. *See Hoopa Valley*, 913 F.3d at 1004.

California's inaction here echoes the legally relevant facts of *Hoopa Valley*. The applicants sought a state certification. More than a year passed without a decision to "give" or "den[y]" that certification. 33 U.S.C. § 1341(a). And no "wholly new" or even materially "different" request was submitted in that first year "such that it restart[ed] the one-year clock." *Hoopa Valley*, 913 F.3d at 1104. Petitioners and State *Amici* try two tacks to avoid this inconvenient truth. Neither tack has merit.

1. Coordination between the applicant and the state is not a necessary condition for finding waiver.

First, Petitioners and State *Amici* overstate the significance of the formal agreement between the states and the applicant in *Hoopa Valley*. Those parties effectively agreed to toll Section 401's deadline by withdrawing and resubmitting the same application before the deadline

each year. *See, e.g.*, Env. Br. 29; Cal. Br. 58–59; State *Amici* Br. 11. It is correct that the question presented in *Hoopa Valley* was "whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year." 913 F.3d at 1103. But the factual reason why the state missed the one-year certification was not material to the holding. *See id.* All that mattered was that the statute included a "temporal element" mandating that the time "shall not exceed one year." *Id.* at 1103–04. The parties had submitted no materially "'new request' such that it restarts the one-year clock." *Id.* at 1104. The D.C. Circuit (like the statute) did not therefore inquire into whether that agreement was made in good or bad faith.

The Second Circuit's decision in *New York II*—supposedly on a less "egregious" set of facts (*see* Cal. Br. 58)—confirms *Hoopa Valley* and the "bright line" nature of the Section 401-waiver analysis. In *New York II*, New York's certifying agency "asked the applicant to stipulate to a different receipt date" for the certification request in order to "giv[e] itself 36 more days" to complete its review. 991 F.3d at 447–48. The court

upheld FERC's conclusion that New York had waived its authority to make a certification determination under Section 401. The issue was not that the parties had "dictate[d] the beginning of the review by agreement." *Id.* at 448 (quoting *N.Y. State Dep't of Envtl. Conservation v. FERC* (*New York I*), 884 F.3d 450, 456 (2d Cir. 2018)). Instead, the court concluded that allowing such voluntary arrangements "would 'blur [Section 401's] bright-line rule into a subjective standard.'" *Id.*

The Second Circuit similarly looked to "[t]he legislative background of Section 401," which "shows with a good deal of clarity that limiting a certifying state's discretion and eliminating a *potential* source of regulatory abuse was what the one-year limit in Section 401 was intended to achieve." *New York II*, 991 F.3d at 448 (emphasis added). "[B]eliev[ing] Congress intended to limit one state's ability to delay or otherwise upset" the federal licensing process, the court concluded that "Congress could not have intended to permit the arrangement" to evade Section 401's deadline, which impermissibly "introduce[d] the uncertainty the one-year limitation period was intended to eliminate." *Id.* at 448–49. Ultimately, "Section 401's bright-line rule also preclude[d] the line-blurring arrangement under review in [*New York II*]." *Id.* at 450.

Petitioners quibble about whether there was an implicit agreement between the applicants and California to extend the one-year waiver deadline. This is a red herring. Such a finding is not needed. All that matters is whether there was a decision, or the submission of a "wholly new" or sufficiently "different" application, within "the one-year clock." *See Hoopa Valley*, 913 F.3d at 1104.

FERC has previously declined to find waiver where a "licensee acts unilaterally for its own benefit and by its own initiative" to "withdraw[] and refile[] its application in order to avoid potentially unfavorable water quality certification conditions." *Village of Morrisville*, 173 FERC ¶ 61156, 61940 (2020). But this reasoning, too, is not supported by the statute. "Section 401's text is clear" that one year "is the absolute maximum." *Hoopa Valley*, 913 F.3d at 1103–04. Allowing an *ad hoc* extension of that period—whether unilaterally or for the applicant's benefit—would swallow Section 401's "bright-line rule" and grant state and federal agencies the discretion that Congress precluded by its parenthetical clarification "(which shall not exceed one year)." 42 U.S.C. § 1341(a).

Notably, the *New York II* Court did not disagree or otherwise engage with the rationale of *Village of Morrisville*. The court merely distinguished the case in passing by discussion of immaterial facts. *See New York II*, 991 F.3d at 449–50. Allowing any agreement to withdraw and resubmit an application—even when "unilaterally and in [an applicant's] own interest"—cannot be reconciled with "Section 401's bright-line rule." *See id.* Such discretion would undercut the deadline's intended purpose to "protect the regulatory structure" even to the detriment of state authority and "the rights of individual applicants." *Id.* at 448.

2. Nothing in Section 401 requires complete state inaction to find waiver.

Petitioners and State *Amici*, relying on another dictum in *North Carolina DEQ*, also try to distinguish *Hoopa Valley* on the ground that the "deliberate and contractual idleness" of the states in that case is not present here. *See, e.g.*, Env. Br. 25; Cal. Br. 60–61; State *Amici* Br. 8, 16. The Second Circuit correctly rejected a similar attempt to limit *Hoopa Valley*. In *New York II*, there was "no indication that [New York] engaged in the kind of 'deliberate and contractual idleness' found in *Hoopa Valley Tribe*." *Compare* 991 F.3d at 449–50, *with* Cal. Br. 60. Yet the court

"conclude[d] that Section 401's bright-line rule also preclude[d]" the state's and applicant's attempt to engineer an extension. *New York II*, 991 F.3d at 449–50. "Congress intended to limit one state's ability to delay or otherwise upset" federal licensing proceedings. *Id.* at 448. Whether that delay took the form of the state "sit[ting] on its hands and do[ing] nothing" or taking "arbitrary action" was immaterial. *See id.* (quoting 91 Cong. Rec. H2690–91).

B. The *Hoopa Valley* rule has not led to a "parade of horribles," and adopting it here will not do so.

Petitioners and State *Amici* warn that a parade of horribles will follow should the Court enforce Section 401's one-year deadline. These warnings are not persuasive. No such grievous problems have arisen since the D.C. Circuit decided *Hoopa Valley* (or, for that matter, since other courts have issued similar decisions). Federal statutes and broader regulatory schemes provide a broad array of environmental protections. These continue to apply regardless of whether a state or EPA waives its discrete Section 401 certification authority. And Congress's concern about indefinite application reviews has proven valid.

1. The complexity of state certification procedures does not provide a persuasive reason to override Congress's decision to impose a strict time limit on certification decisions.

Petitioners posit that an expansive reading of Section 401's waiver provision is necessary because state certification procedures are now so complex that they often cannot be completed within one year. *See, e.g.*, Env. Br. 46 n.17 ("development and environmental review of license applications may take several years for complex projects"). But Section 401 requires neither states *nor even EPA* to complete a Section 401 certification. And these policy arguments run flatly contrary to the text, purpose, and legislative history of Section 401.

Petitioners fail to acknowledge that a state's opportunity to issue a Section 401 water-quality certification is a mere backstop to a federal agency's own environmental-review processes under NEPA (and often other statutory provisions). NEPA reviews of major federal agency actions with significant environmental impacts are comprehensive. *See* 42 U.S.C. § 4332(2)(C). That includes NEPA reviews of the hydroelectric licenses at issue here. *See, e.g.*, 1-ER-00010. For such actions, NEPA and its implementing regulations require, among other things, "a detailed statement" on "the environmental impact of the proposed

action," unavoidable "adverse environmental effects," and "alternatives." *Id.*; *see, e.g.*, 40 C.F.R. 1500.1(a), 1502.1–1502.24 (provisions governing Environmental Impact Statements). A recent survey of more than 600 Environmental Impact Statements found that, between 2013 and 2018, the average Environmental Impact Statement had ballooned to nearly 700 pages, excluding appendices, and over 1,700 pages when including the appendices. Council on Environmental Quality, *Length of Environmental Impact Statements (2013–2018)*, at 1 (June 12, 2020).[2] Not surprisingly, environmental reviews requiring an Environmental Impact Statement under NEPA usually take 4.5 years on average to complete. Council on Environmental Quality, *Environmental Impact Statement Timelines (2010–2018)*, at 1 (June 12, 2020).[3]

Section 401 of the CWA, by contrast, imposes no requirements comparable to those provided by NEPA and the NEPA regulations. Section 401 leaves the procedural scope of the certification review largely to the discretion of the states—which may not even have "authority to

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[2] https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Length_Report_2020-6-12.pdf.

[3] https://ceq.doe.gov/docs/nepa-practice/CEQ_EIS_Timeline_Report_2020-6-12.pdf.

give such a certification" *at all*. *See* 33 U.S.C. § 1341(a)(1) (requiring "procedures for public notice in the case of all applications for certification" and permitting, "to the extent [the state] deems appropriate, procedures for public hearings in connection with specific applications"). California recites at length the measures its legislature has taken to set and alter its own certification procedures under Section 401. *See* Cal. Br. 9–11. A state may create procedures that cannot always be finished in one year, yet that cannot permit more time than Congress allowed by a federal statute. Congress is clear that whatever process a state pursues, it must act "within a reasonable period of time (which shall not exceed one year)." 42 U.S.C. § 1341(a).

Notably, California admits that "California law requires the State Board to ultimately grant or deny requests for certification rather than allow its certification authority to be waived under Section 401." Cal Br. 11 (citing Cal. Water Code § 3859(a)). Indeed, California notes that "the California Legislature recently authorized the Board to issue 401 certifications without CEQA documentation"—the issue Petitioners blame for the delays in this case. *Id.* at 28 n.16 (citing Cal. Water Code § 13160(b)(2)). By inserting a mechanism into California's processes so

as to comply with Section 401's deadline, California has *de facto* admitted that no parade of horribles need result from an adverse decision here. By its own admissions and actions, California now has the authority to give or deny the water quality certifications within the period specified by Congress—even if it would prefer more time.

2. Petitioners' other policy arguments fail to justify a lengthy certification process.

Petitioners and State *Amici* offer a grab bag of other policy arguments. These are intended to justify their broad and atextual interpretation of Section 401(a) at the expense of the *Hoopa Valley* rule. These arguments also lack merit.

First, Petitioners claim that Section 401's one-year deadline is so unreasonably short that it "could result in incomplete applications and premature decisions." *Hoopa Valley*, 913 F.3d at 1105. That is an issue to raise with Congress, not this Court. As the D.C. Circuit put it, "it is the role of the legislature, not the judiciary, to resolve such fears." *Id.* The Second Circuit agreed, even though it was "sympathetic" to concerns about the state's interest "in protecting its water quality." *New York II*, 991 F.3d at 450. The court recognized that it was "bound by what we believe to be Congress's intention expressed in the text of Section 401 and

reinforced in its legislative history to reduce flexibility in favor of protecting the overall federal licensing regime." *Id.* This Court is similarly bound.

Second, Petitioners complain that they should not be forced to waive certification as a result of alleged noncompliance with state application procedures, as claimed here. California thus lays blame on the certification applicants for allegedly failing to diligently pursue California's CEQA review procedures. But if there is noncompliance with appropriate state procedures capable of generating a decision "within a reasonable period of time" (as specified by the statute), 33 U.S.C. § 1341(a), states can avoid waiver. They can deny an application if the applicant lacks required documentation and if denial is otherwise lawful and consistent with the "reasonable period of time" requirement. California, which by law "requires the State Board to ultimately grant or deny requests for certification rather than allow its certification authority to be waived," already implicitly recognizes a lawful denial can be a viable option for avoiding waiver. Cal. Br. 11 (citing Cal. Water Code § 3859(a)).

State *Amici* contend that this option is "untenable" because "[t]he applicant may then seek judicial review of the denial, creating further administrative burdens and uncertainties." State *Amici* Br. 21. But if an applicant fails to comply with reasonable, lawful state procedural requirements for obtaining certification, a state should defeat judicial review of the denial. And if a state agency has unlawfully denied certification or imposes unreasonable processes, then judicial review to correct the violation of law is perfectly appropriate. In fact, the Second Circuit already recognized appropriate denials as a means of avoiding Section 401 waiver. It rejected the same concerns that State *Amici* raise here as "misplaced" in *New York I*. 884 F.3d at 456. "[D]enials of applications are not likely to prompt a deluge of litigation" because "this litigation incentive already exists; applicants can argue before FERC that their applications are complete under [state] regulations." *Id.*

Third, Petitioners raise the possibility that an applicant may have a legitimate need to withdraw its application to supplement or alter it in some material way. But as *Hoopa Valley* suggests, where an applicant has "withdr[awn] its request and submitted a wholly new one in its place," the statute might in that case allow a state and applicant to

"restart[] the one-year clock" when it resubmits. 913 F.3d at 1104. The D.C. Circuit declined to address "how different a request must be to constitute a 'new request'" that triggers a new one-year period. *Id.* And there is no claim that applicants here pursued a new or materially different request within one year of initial application to California. Moreover, a denial for failure to complete lawful requirements might also "prompt the applicant to resubmit the application with additional material." *New York II*, 991 F.3d at 450 n.11.

3. Indefinite licensing delays have adverse consequences.

Petitioners and State *Amici* suggest that enforcing Congress's one-year waiver deadline would have adverse environmental consequences. These fears are not supported. And the plain text and context give this Court no place to consider and balance equities when interpreting Section 401. Nevertheless, the unfavorable public-welfare consequences of lengthy and indefinite delays to federal licensing and permitting processes are well established and severe.

Project delays can strain the public fisc, disincentivize private investment, and stymie infrastructure growth. According to a study of "inland waterways" navigation-infrastructure projects (e.g., dredging

and locks), "one year of delay of a new construction project is tantamount to losing an average of 37 cents on every dollar invested." Vijay Perincherry and Fang Wu, HDR Decision Econ., *Cost of Project Delays: An Estimate of Forgone Benefits and Other Costs Related to Schedule Delays of Inland Waterway Projects* 2 (June 2012).[4] In another example, a three-month delay in an $85.2 million highway reconstruction in a large metropolitan area cost an additional $4 million, or $1.3 million per month of delay. Curtis Beaty et al., Tex. A&M Transp. Inst., *Assessing the Costs Attributed to Project Delay During Project Pre-Construction Stages* 2 (Mar. 2016).[5] The opportunity costs are equally stark. If, for example, NEPA Environmental Impact Statements for energy and transit projects (*see* 42 U.S.C. § 4332(2)(C)) could be completed in two years rather than their current respective averages of 3.7 years and 6.6 years, 119 additional infrastructure projects totaling $123.5 billion would be available for investment. Curtis Arndt, American Action Forum,

[4] http://www.nationalwaterwaysfoundation.org/study/HDRstudy.pdf.

[5] https://static.tti.tamu.edu/tti.tamu.edu/documents/0-6806-FY15-WR3.pdf.

Regulatory Burdens and the Supply of Infrastructure Projects (Feb. 23, 2017).[6]

Infrastructure development—which Congress recently boosted through the new $1.2 trillion Infrastructure Investment and Jobs Act—offers a wealth of economic and public benefits, including environmental benefits. The economic benefits include the direct and indirect benefits of construction, operation, and maintenance (e.g., job creation). The environmental benefits include clean water, climate resiliency, and renewable energy. White House, *Fact Sheet: The Bipartisan Infrastructure Deal* (Nov. 6, 2021).[7] For every $1 billion spent on infrastructure, the investment supports more than 15,000 direct and indirect jobs throughout the economy. Am. Road & Transp. Builders Ass'n, *Economic Impacts of Highway, Bridge, & Transit Investment in California* (July 2021).[8] The benefits flow to consumers and businesses alike.

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[6] https://www.americanactionforum.org/research/infrastructure-regulatory-burdens.

[7] https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/.

[8] https://www.catransportationjobs.com/wp-content/uploads/2021/07/California-Economic-Report-2021.pdf.

Allowing states to hold up projects through indefinite Section 401 reviews delays, and in some instances completely prevents, these benefits from being realized. One state's (or state interest group's) "not in my backyard" concerns may deprive not only the residents of that state, but residents of neighboring states and of the nation as a whole, of jobs, infrastructure development, and other benefits. *Cf. Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n*, 894 F.2d 571, 579 (2d Cir. 1990).

In any event, Congress has already weighed these considerations. Through imposing the one-year outer bound for states—and even EPA—to grant or deny Section 401 certifications, Congress unmistakably expressed the view that prompt continuation of federal licensing or permitting is paramount. In the absence of timely, decisive action on a certification application, federal agency processes are to continue. Congress's judgment must be respected.

CONCLUSION

For these reasons, the Court should deny the petitions for review.

Dated: December 13, 2021

Respectfully submitted,

/s/ *Jonathan D. Brightbill*

Jonathan D. Brightbill
Lauren Gailey
WINSTON & STRAWN LLP
1901 L Street, NW
Washington, DC 20036
(202) 282-5000
(202) 282-5100 ~ Fax
jbrightbill@winston.com
lgailey@winston.com

Andrew R. Varcoe
Stephanie A. Maloney
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae
the Chamber of Commerce of
the United States of America

CERTIFICATE OF COMPLIANCE

I, Jonathan D. Brightbill, attorney for *amicus curiae* the Chamber of Commerce of the United States of America, certify that this BRIEF OF *AMICUS CURIAE* complies with the word-count limit of this Court's order of July 30, 2021, because, excluding the parts of the document exempted by Rule 32(f), it contains 6,934 words. This document complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook.

By: */s/ Jonathan D. Brightbill*

Jonathan D. Brightbill
WINSTON & STRAWN LLP
1901 L Street, NW
Washington, DC 20036
(202) 282-5000
(202) 282-5100 ~ Fax
jbrightbill@winston.com

Dated: December 13, 2021

CERTIFICATE OF SERVICE

I, Jonathan D. Brightbill, attorney for *amicus curiae* the Chamber of Commerce of the United States of America, certify that on December 13, 2021, this BRIEF OF *AMICUS CURIAE* was electronically filed with the Clerk of Court using the ECF system, which will notify all counsel of record.

By: */s/ Jonathan D. Brightbill*

Jonathan D. Brightbill
WINSTON & STRAWN LLP
1901 L Street, NW
Washington, DC 20036
(202) 282-5000
(202) 282-5100 ~ Fax
jbrightbill@winston.com

Dated: December 13, 2021