No. 17-57

In the Supreme Court of the United States

PACIFIC GAS & ELECTRIC COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES, *et al.*,
Respondents.

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

BRIEF FOR THE STATE RESPONDENTS IN SUPPORT OF PETITION

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RESPONSE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondents the People of the State of California, ex rel. Attorney General Xavier Becerra, and the California Department of Water Resources, by and through its California Energy Resources Scheduling Division (CERS), were plaintiffs in the Court of Federal Claims and appellants in the court of appeals. The state respondents agree with petitioners that the decision below warrants review and reversal by this Court.[1]

REASONS FOR GRANTING THE PETITION

Petitioners are three investor-owned utilities that are regulated by the State of California and together supply electricity to millions of California residents and businesses. Along with CERS, petitioners purchased electricity sold by two federal agencies through multilateral energy exchanges at rates that the Federal Energy Regulatory Commission later found were not just and reasonable. As the petition explains (*see* Pet. 13-16), the decision below holds that petitioners and CERS were not in privity of contract with the federal agencies, and thus may not pursue contract claims against the agencies in the Court of Federal Claims. That decision cannot be reconciled with a decision of the Eighth Circuit upholding a breach-of-contract claim under closely analogous circumstances, or with a long line of cases recognizing privity of contract between buyers and sellers on stock and commodity exchanges. *See* Pet. 16-20. It also threatens to disrupt the functioning of

[1] In accordance with Rule 12.6, counsel of record for all other parties were notified within 20 days after the case was placed on the docket that the state respondents intended to file a response supporting the petition.

energy exchanges that play a critical role in state electricity markets, and to require state residents and businesses to bear the burden of unreasonable prices charged by federal agencies for electricity sold on those exchanges.

1. The state respondents agree with petitioners that the decision below is at odds with *Alliant Energy v. Nebraska Public Power District*, 347 F.3d 1046 (8th Cir. 2003). *See* Pet. 17-19; *see also* Pet. App. 43a-44a (Newman, J., dissenting). In *Alliant*, the Eighth Circuit held that sellers who charged unlawful rates for electric transmission service sold through a multilateral power pool had breached a contractual obligation to buyers by refusing to pay refunds. *See* 347 F.3d at 1048-1051. The buyers had a valid contract claim because each market participant had signed an agreement expressly incorporating a FERC-approved tariff. *See id.* at 1050-1051. That holding cannot be squared with the decision below, which holds that petitioners and CERS were not in privity of contract with federal agencies that sold them electricity through similar multilateral energy markets, even though each of the market participants had likewise signed an agreement incorporating the relevant FERC tariff. Pet. App. 4a-6a, 13a-19a. The decision below seeks to distinguish *Alliant*, apparently based on the view that the particular way the contractual relationship was structured in that case differed from the structure used here in some respects. *See id.* at 25a. But nothing in *Alliant* turns on that consideration. *See* 347 F.3d at 1050-1051. There is no basis for believing that the Eighth Circuit would have reached a different conclusion if it had been confronted with the facts presented here.

The state respondents also agree that the decision below cannot be reconciled with a line of prece-

dent regarding the relationship between buyers and sellers in stock and commodities exchanges. *See* Pet. 19-20. Those cases recognize that "[t]he constitution and rules of a stock exchange constitute a contract between all members of the exchange with each other." *Muh v. Newburger, Loeb & Co.*, 540 F.2d 970, 973 (9th Cir. 1976); *see* Pet. 19-20 (collecting cases). Even when there is no bilateral contract between two parties doing business through such an exchange, this Court has held that there can be "sufficient privity of contract between" buyers and sellers to sustain a suit for breach of contract. *Clews v. Jamieson*, 182 U.S. 461, 488 (1901). The decision below departs from that settled and sensible approach. *See* Pet. App. 42a (Newman, J., dissenting) (observing that the majority opinion "is not the law of contracts").

2. The questions presented by this case are important. The reliable flow of electricity is essential to the functioning of a modern society. Electricity powers computers to keep businesses running, traffic signals to keep roads operational, refrigeration to keep food safe, and hospitals to help the sick. During the energy crisis in the western States in 2000 and 2001, California experienced episodic rolling blackouts, and artificial inflation of electricity prices led to a situation in which buyers of energy such as petitioners could not afford to purchase sufficient electricity to serve all their customers. That created the possibility of further blackouts throughout California, posing a direct threat to the State's economy and the health and safety of its residents. *See generally* Pet. 9-11; *Pub. Utilities Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1036-1045 (9th Cir. 2006).

Acting on an emergency basis, the California Legislature created the California Energy Resources Scheduling Division as the "buyer of last resort," to

ensure that necessary electricity could be purchased.[2] CERS signed the multilateral contracts required to buy electricity through the California Power Exchange and Independent System Operator markets. *See* Pet. 8. In the first half of 2001, CERS purchased more than $5 billion of electricity through these markets, much of it at grossly inflated prices. *See Pub. Utilities Comm'n*, 462 F.3d at 1042. Some of that overpriced electricity was sold by the United States through the Bonneville Power Administration and the Western Area Power Administration.

In July 2001, the Federal Energy Regulatory Commission concluded that the prices charged by electricity sellers during this period were not just and reasonable and ordered them corrected, triggering a refund obligation on the part of all sellers. *See* Pet. 10. But the two federal power agencies refused to provide refunds to CERS—or to anyone else—on overcharges connected to their electricity sales during the relevant periods. *See id.* at 11. Sixteen years after the energy crisis, these federal agencies still have not made California whole with respect to millions of dollars in contract claims. If this Court does not review the decision below, the United States will have succeeded in avoiding legal recourse in this case—for reasons that are neither technically correct nor just. *Cf. Bonneville Power Admin. v. FERC*, 422 F.3d 908, 925 (9th Cir. 2005) (holding that FERC could not compel federal agencies to refund overcharges, but observing that the agencies might be subject to breach-of-contract claims).

The questions presented by this petition are also of considerable prospective importance. Federal

[2] "Scheduling" is a term of art that refers to the physical transfer of electricity.

power agencies generate over 266 million megawatt hours of electricity per year, accounting for more than six percent of all electricity generated in the United States.[3] They continue to sell electricity through California's Independent System Operator, and through similar exchanges operating in most of the other States. *See* Pet. 29. These exchanges perform a critical function for electricity markets by helping to balance real-time supply and demand for electricity.[4] Buyers who purchase electricity through these exchanges must accept the energy offered by unknown sellers, which may include federal agencies. The rule adopted by the court below threatens the stability of such exchanges, because buyers may be less willing to purchase electricity through an exchange if they lack a direct contract remedy against federal sellers that charge excessive rates. *See* Pet. 27-28.

The Federal Circuit's decision also threatens to harm consumers and businesses—including more than 33 million people in California who obtain their electricity from the petitioners in this case.[5] Energy purchasers that cannot recoup the cost of overcharg-

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[3] *See* American Public Power Association, 2015-2016 Annual Directory & Statistical Report 28, *available at* http://www.publicpower.org/files/pdfs/uselectricutilityindustrystatistics.pdf (last visited Aug. 2, 2017).

[4] *See generally Pub. Utilities Comm'n*, 462 F.3d at 1038-1039; C.A. Amicus Br. of Pub. Utilities Comm'n of Cal. & Nat'l Ass'n of Regulatory Utility Comm'rs 13-16.

[5] *See* PG&E, Company Profile, *available at* https://www.pge.com/en_US/about-pge/company-information/profile/profile.page (last visited Aug. 2, 2017); S. Cal. Edison, Who We Are, *available at* http://goo.gl/5nXmrZ (last visited Aug. 2, 2017); SDG&E, Company Facts, *available at* https://www.sdge.com/aboutus (last visited Aug. 2, 2017).

es paid to federal agencies, such as the petitioners in this case, pass those costs on to their customers. *Cf. San Diego Gas & Elec. Co.*, 125 FERC ¶ 61,214, at 62,111 (2008) (noting that the "shortfall in refunds must be allocated somehow among buyers"). By foreclosing breach-of-contract claims against federal power agencies that charged rates that FERC—another federal agency—has expressly determined were not just and reasonable, the decision below effectively requires ratepaying state businesses and residents to subsidize the cost of federal misconduct. That unjust and inappropriate result warrants review and correction by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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