No. 17-57

In the Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

In 2000-2001, petitioners bought electricity from two California energy exchanges. Two federal agencies separately sold electricity to those exchanges. The only contracts the agencies entered into for the sale of energy were between each agency and each exchange. Petitioners and the agencies did not contract with each other, and they were only a few of the dozens of participants in the energy markets.

Petitioners brought a breach of contract action against the United States for alleged overcharges. The trial court dismissed petitioners' claims for lack of jurisdiction, holding that petitioners were not in contractual privity with the United States and therefore lacked standing to assert the contract claims at issue. In the alternative, the trial court dismissed on the merits. The court of appeals affirmed the jurisdictional dismissal, and therefore did not reach the merits. The questions presented are:

1. Whether the court of appeals correctly held that petitioners lacked standing to assert breach of contract claims against the United States, where petitioners and the federal agencies did not enter contracts with each other, but instead each separately entered into contracts with the two California exchanges for the purchase and sale of electricity.

2. Whether the court of appeals correctly held that petitioners lacked standing to assert breach of contract claims against the United States on the basis that the California exchanges acted as agents for the federal agencies, where the agencies lacked any meaningful control over the exchanges.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 838 F.3d 1341. The opinions of the United States Court of Federal Claims (Pet. App 48a-51a, 52a-113a, 114a-119a, 120a-127a, 128a-138a, 139a-181a) are reported at 121 Fed. Cl. 281, 122 Fed. Cl. 315, 114 Fed. Cl. 146, 110 Fed. Cl. 135, 110 Fed. Cl. 143, and 105 Fed. Cl. 420.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 2016. A petition for rehearing was denied on February 6, 2017 (Pet. App. 182a-183a). On May 2, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 6, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Bonneville Power Administration (Bonneville) is a federal nonprofit agency created by Congress in 1937 and based in the Pacific Northwest. Bonneville Project Act of 1937, 16 U.S.C. 832 *et seq.* Bonneville markets wholesale electric power primarily from 31 federal hydroelectric projects owned and operated by the Army Corp of Engineers and the U.S. Bureau of Reclamation. Bonneville is a self-funding agency that funds its programs through its own revenues, with congressional oversight. See 16 U.S.C. 838i. By statute, Bonneville must meet the power needs of its preference customers, which consist of a variety of public-body and cooperative utilities in the Northwest. 16 U.S.C. 832c(a); see generally *Association of Pub. Agency Customers, Inc.* v. *Bonneville Power Admin.*, 126 F.3d 1158, 1164 (9th Cir. 1997).

The Western Area Power Administration (Western) was created by Congress in 1977 as part of the Department of Energy Organization Act. 42 U.S.C. 7101 *et seq.* Pursuant to federal law, Western, like Bonneville, does not operate for a profit and must meet the needs of its preference customers, who consist primarily of municipalities, cooperatives, and other nonprofit organizations. 43 U.S.C. 485h(c); see generally *North Star Steel Co.* v. *United States*, 477 F.3d 1324, 1326-1327 (Fed. Cir. 2007).

2. In the 1990s, California restructured and deregulated its energy market. It established two exchanges to purchase and sell wholesale electric power in the State. Pet. App. 4a. One exchange, the California Power Exchange Corporation (Cal-PX), was created to provide a market for wholesale energy transactions in the State. *Id.* at 3a-4a. It did so by contracting with sellers to

obtain electricity from them, and then contracting with purchasers to provide it to them. *Id.* at 4a. The other exchange, the California Independent System Operator (Cal-ISO), was formed to assume operational control over California's electric transmission facilities and ensure supply and demand on a real-time basis. *Id.* at 3a, 5a. Cal-ISO maintained a real-time market for electricity to maintain balance in the Cal-PX market. *Id*. at 5a.

All purchasers and sellers of wholesale energy in the Cal-PX and Cal-ISO markets entered into individual agreements with the particular exchanges, known as participation agreements and scheduling coordinator agreements, respectively. Pet. App. 5a-6a. The exchanges' agreements incorporated the respective tariffs that the exchanges filed with the Federal Energy Regulatory Commission (FERC), which regulates the interstate sale of wholesale electricity and transmission services. *Ibid*. None of the participants in the Cal-PX and Cal-ISO markets entered into contracts with each other regarding sales in those markets. *Id*. at 6a.

Market participants submitted bids to Cal-PX to either sell or buy electricity for a particular time period. Pet. App. 6a. In processing bids, Cal-PX did not match particular sellers with particular purchasers. *Ibid.* Instead, Cal-PX developed aggregate supply and demand curves from the total pool of bids it received, and then set a market clearing price, *i.e.*, the price bid by the highest-priced seller whose electric energy was needed to "clear the market" or balance the supply of electric energy against the demand. *Bonneville Power Admin.* v. *FERC*, 422 F.3d 908, 912 (9th Cir. 2005), cert. denied, 552 U.S. 1076 (2007) (*Bonneville*). Cal-PX either paid the market clearing price to, or received it from, the

market participants whose bids it accepted. Pet. App. 6a. Purchasers of electricity did not pay sellers directly. *Ibid.* Indeed, purchases and sales of electricity could not be traced to particular consumers and producers in the California markets. *Ibid.* The Cal-ISO market functioned similarly. *Ibid.*

In 1999, Bonneville and Western (collectively, the agencies) began selling electricity to the California exchanges, along with many other sellers. Pet. App. 6a. Petitioners were several of numerous purchasers of energy from the exchanges. *Ibid.* Consistent with the general framework just discussed, the agencies did not enter into any contracts with petitioners for the sale of wholesale energy in the Cal-PX and Cal-ISO markets. *Ibid.*

3. a. In 2000 and 2001, California suffered an energy crisis. Pet. App. 7a. During that time, petitioners believed that the rates established by the exchanges were unjust and unreasonable. *Ibid.* In August 2000, they sought relief by filing a complaint with FERC. *Ibid.* Pursuant to the Federal Power Act, 16 U.S.C. 791a *et seq.*, FERC may set an effective date, determine whether rates charged after that date are just and reasonable, and order entities within its jurisdiction to pay refunds for rates charged after the effective date that it finds were unjust and unreasonable. 16 U.S.C. 824(b), 824e(a)-(b) (2000); see Pet. App. 8a. In response to petitioners' complaint, FERC set an effective date of October 2, 2000, determined that rates charged after that date were unjust and unreasonable, and ordered sellers in the California market to pay refunds. Pet. App. 8a.

b. Bonneville and other government utilities appealed FERC's decision to the United States Court of

Appeals for the Ninth Circuit, contending that FERC lacked jurisdiction to order them to pay refunds. The court of appeals agreed. *Bonneville Power Admin.*, *supra*. It explained that FERC's jurisdiction is limited by Section 201(f) of the Federal Power Act, which states that "[n]o provision in this subchapter shall apply to, or be deemed to include, the United States * * * or any corporation which is wholly owned" by the United States. 16 U.S.C. 824(f). And FERC's authority "to investigate rates and to order refunds for unjust and unreasonable rates" is limited by Sections 205 and 206 of the Federal Power Act to "public utilit[ies]," 16 U.S.C. 824e(a)-(b), which the statute defines not to include agencies like Bonneville and Western. *Bonneville*, 422 F. 3d at 910, 918 (emphasis omitted). This Court denied petitioner Pacific Gas & Electric Company's petition for a writ of certiorari in *Bonneville*. *Pacific Gas & Elec. Co.* v. *Bonneville Power Admin.*, 552 U.S. 1076 (2007) (No. 17-155). Following the transactions at issue, Congress amended the Federal Power Act to allow FERC to order the agencies to pay refunds under specific circumstances, though this amendment applies only prospectively. Energy Policy Act of 2005 (Energy Policy Act), Pub. L. No. 109-58, Tit. XII, Subtit. G, § 1286, 119 Stat. 981 (16 U.S.C. 824e(e)).

c. On remand from *Bonneville*, FERC issued a new order acknowledging that "[i]n the case of the non-public utility entities, the court has determined that those parties have no refund obligations under [Federal Power Act] [S]ection 206." *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs. into Markets Operated by the Cal. Indep. Sys. Operator & the Cal. Power Exch.*, No. EL00-95-164, 2007 WL 3047581, at *10 (FERC Oct. 19, 2007). Subsequently, however,

FERC purported to clarify that it had "amend[ed] the [ISO and PX] tariffs to reset the market clearing price." *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs. into Markets Operated by the Cal. Indep. Sys. Operator & the Cal. Power Exch.*, No. EL00-95-2005, 2007 WL 4103712, at *4 (FERC Nov. 19, 2007). The agencies appealed that order to the Ninth Circuit. In *City of Redding* v. *FERC*, 693 F.3d 828 (2012), the court of appeals held that, although "FERC has the authority to state retroactively what a 'just and reasonable' rate would have been pursuant to its refund authority, Congress did not provide FERC with retroactive ratesetting authority over non-jurisdictional sellers" like the agencies. *Id.* at 841. Thus, FERC's hypothetical "would have been" market prices did not apply to the agencies. *Ibid.*

4. Following the Ninth Circuit's holding in *Bonneville* that FERC lacked jurisdiction to order the agencies to pay refunds, petitioners pursued a parallel track in an effort to obtain refunds from the agencies. In 2007, they filed this suit in the United States Court of Federal Claims, alleging that the agencies breached agreements between purchasers and sellers of electricity in the California energy markets by charging petitioners more than the rate that FERC had allegedly reset for all market participants. Pet. App. 8a-9a. The original trial judge found in favor of petitioners on liability. *Id.* at 139a-181a. Following his departure from the bench, however, the case was reassigned to another judge, who "independent[ly] examin[ed] * * * each sentence" of the prior decision and, after providing petitioners the opportunity to address her concerns, vacated the prior judge's ruling. *Id.* at 116a; see *id.* at 114a-119a.

The trial court then dismissed the case for lack of standing because petitioners were not in privity of contract with the agencies, and the court lacked subject matter jurisdiction over the claims for the same reason. Pet. App. 80a-97a. In the alternative, the trial court held that there was no breach of contract because under *Bonneville* and *City of Redding*, FERC could not have reset the rates the agencies charged in the California energy markets. *Id.* at 97a-111a.

5. a. The court of appeals affirmed, holding that petitioners lacked standing to pursue their breach of contract claims. Pet. App. 1a-37a. The court therefore had no need to address the trial court's alternative grounds for dismissal. *Id.* at 10a & n.2.

The court of appeals explained that "typically '[t]o have standing to sue the sovereign on a contract claim, a plaintiff must be in privity of contract with the United States.'" Pet. App. 12a (brackets in original) (quoting *Anderson* v. *United States*, 344 F.3d 1343, 1351 (Fed. Cir. 2003)). The court further observed that privity of contract is not only "a fundamental requirement of contract law, but it takes on even greater significance in cases such as this, because the 'government consents to be sued only by those with whom it has privity of contract.'" *Ibid.* (quoting *Southern Cal. Fed. Sav. & Loan Ass'n* v. *United States*, 422 F.3d 1319, 1328 (Fed. Cir. 2005), cert. denied, 548 U.S. 904 (2006)). Applying this Court's precedent, the court of appeals stated that it "do[es] not lightly presume that the government's actions give rise to contractual obligations when the government is not a named party to the contract in dispute." *Ibid.* (citing *United States* v. *Algoma Lumber Co.*, 305 U.S. 415, 421 (1939)).

Here, the court of appeals explained, "[o]n the face of it, the only contracts * * * were between the exchanges—Cal-PX and Cal-ISO—and individual market participants (the consumers and producers)." Pet. App. 4a; see *id.* at 13a. "Each contract described the parties as being the individual participant and the exchange only." *Id.* at 13a. The court reviewed the specific details of the individual contracts, and the tariffs incorporated into them, and concluded that they made clear that the exchanges were purchasing electricity from sellers, such as the agencies, and selling electricity to buyers, such as petitioners. *Id.* at 14a-19a; see *id.* at 19a ("We conclude that the contracts between the exchanges and the participants are middleman contracts for the purchase and sale of electricity."). "Indeed," the court observed, "individual contracts between consumers and producers were not feasible since electricity is fungible, and purchases and sales of electricity could not be traced to particular consumers and producers in the California markets" once it was bought and resold by the exchanges. *Id.* at 6a. "Significantly," the court added, "both FERC and the Ninth Circuit understood that the contracts between individual market participants and the exchanges were middleman contracts for the purchase and sale of electricity, and that no contractual privity existed between market participants." Pet. App. 26a; see *id.* at 27a.

The court of appeals considered and rejected petitioners' arguments as to why, notwithstanding the lack of direct contractual privity, there existed a contractual relationship among all purchasers and all sellers in the California markets. Pet. App. 19a-23a. The court concluded that "[n]o written document purports to be such

an agreement, and the various provisions on which appellants rely cannot be read to create such an agreement." *Id.* at 19a-20a. Likewise, the court rejected petitioners' "analogy to the law of stock exchanges," on which petitioners relied to argue that any participant in such an exchange can bring a breach of contract action against any other participant. *Id.* at 23a; see *id.* at 24a.

Having found no privity, the court of appeals also considered petitioners' argument that they should fall under an exception to the privity requirement, rejecting petitioners' contention that they could establish standing because the exchanges purportedly acted as the agencies' and petitioners' agents. Pet. App. 28a-33a. The court affirmed the trial court's conclusion that, based on the record in this case, the agencies lacked any meaningful control over the exchanges, and the exchanges in fact exercised plenary authority over establishing prices, collecting funds, and other aspects of market operations. *Id.* at 32a.[1]

b. Judge Newman dissented. Pet. App. 38a-47a. She would have held that petitioners and the agencies were in contractual privity because the buying and selling of electricity into common markets created a contractual relationship among all buyers and sellers that is subject to the terms of the exchanges' FERC tariffs. *Id.* at 42a-44a. In addition, Judge Newman suggested possible constitutional bases for relief that petitioners had not raised. *Id.* at 44a-46a.[2]

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[1] The court of appeals also rejected petitioners' argument that they had standing to sue the agencies as third-party beneficiaries of the agencies' contracts with the exchanges. Pet. App. 33a-36a. Petitioners do not renew that argument in this Court. See Pet. i-ii.

[2] Petitioners quote Judge Newman's statement that "[t]he United States does not dispute that it overcharged the plaintiffs for electric

ARGUMENT

The court of appeals correctly held that petitioners lacked standing to sue the agencies for a breach of contract because they were not in contractual privity with the agencies, and the exchanges did not serve as agents for all market participants. The court's decision does not conflict with any decision of this Court or of another court of appeals. Moreover, in response to the issues raised by this dispute, Congress passed legislation 12 years ago to empower FERC to order the agencies to pay refunds in future cases. Energy Policy Act § 1286, 119 Stat. 981. Further review is not warranted.

1. a. The court of appeals correctly concluded that petitioners "lack privity of contract" with the agencies and therefore lack standing to sue the United States for a breach of contract. Pet. App. 2a. Petitioners do not dispute that "[a] plaintiff must be in privity with the United States to have standing to sue the sovereign on a contract claim." *Southern Cal. Fed. Sav. & Loan Ass'n* v. *United States*, 422 F.3d 1319, 1328 (Fed. Cir. 2005), cert. denied, 548 U.S. 904 (2006); see also, *e.g.*, *United States* v. *Driscoll*, 96 U.S. 421, 423-424 (1878); *Anderson* v. *United States* 344 F.3d 1343, 1351 (Fed. Cir. 2003). Indeed, privity of contract is "[n]ot only * * * a fundamental requirement of contract law, but it takes on even greater significance in cases such as this," where the effect of finding privity is to find a waiver of sovereign immunity. *Southern Cal. Fed. Sav. & Loan Ass'n*, 422 F.3d at 1328; *Cienega Gardens* v. *United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998); see also

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power." Pet. 15 (citation omitted). This statement is incorrect. The United States prevailed in the trial court on the alternative ground that the agencies did not overcharge petitioners because the FERC-imposed rate did not apply to the agencies. Pet. App. 107a-111a.

United States v. *Algoma Lumber Co.*, 305 U.S. 415, 421 (1939) (declining to presume that the government's actions gave rise to contractual obligations when the government was not a named party to the contract).

The court of appeals correctly held that petitioners were not in privity of contract with the agencies by virtue of their participation in the California energy markets. Examining the record, the court recognized that "[o]n the face of it, the only contracts here were between the exchanges—Cal-PX and Cal-ISO—and individual market participants (the consumers and producers)." Pet. App. 4a; see *id.* at 13a. Nor was there other evidence in the record reflecting a contractual agreement between the agencies and petitioners. *Id.* at 19a-23a. "Indeed," the court observed, "individual contracts between consumers and producers were not feasible since electricity is fungible, and purchases and sales of electricity could not be traced to particular consumers and producers in the California markets." *Id.* at 6a; see *id.* at 16a.

The court of appeals' decision is consistent with the only other authorities addressing privity in the California electricity markets. In *Southern California Edison Co.* v. *Lynch*, 307 F.3d 794 (9th Cir. 2002), two power generators attempted to intervene in a dispute between petitioner Southern California Edison Company (SoCal Edison) and the commissioners of the California Public Utilities Commission. The court of appeals upheld the district court's denial of the motion to intervene as of right. *Id.* at 803. It explained that the wholesale generators lacked a "significant protectable interest in the litigation" because, *inter alia*, "SoCal Edison is in privity with [Cal-PX], not with [other market participants]." *Ibid.*

In another proceeding, FERC reached the same conclusion in reliance on petitioner SoCal Edison's argument that it was not in privity of contract with other market participants. There, SoCal Edison contended that all electricity sold into Cal-PX should be considered wholesale because "[t]here is no way to match the source of the energy sold by a supplier through the PX with any particular buyer. *Nor is there any contractual relationship in PX transactions between any retail purchaser and any specific generator.*" *Southern Cal. Edison Co.*, 80 F.E.R.C. ¶ 61,262, at 61,945-61,946 (1997) (quoting SoCal Edison Pet. at 11) (emphasis added). FERC agreed, explaining that in Cal-PX, "sellers and buyers of electric energy will not contract directly with one another, as has been tradetionally done in the industry, but instead will contract with the PX." *Id.* at 61,946.

Moreover, the court of appeals correctly observed that its holding did not necessarily leave petitioners without a contractual mechanism through which to pursue the alleged overcharges. Petitioners could have sued the exchanges with whom they indisputably entered into written agreements to purchase electricity. Pet. App. 2a; *id.* at 27a-28a. Likewise, the court correctly observed that the exchanges—the parties with whom the agencies contracted to sell electricity—could have pursued a breach of contract remedy against the agencies. *Id.* at 2a; see *id.* at 15a-16a. That the exchanges have not done so merely reflects the Ninth Circuit's holding that FERC was not authorized to retroactively adjust the rates charged by the agencies, and thus the agencies breached no contract. *City of Redding* v. *FERC*, 693 F.3d 828, 841 (2012).

b. Petitioners contend (Pet. 16-24) that the court of appeals' decision conflicts with "settled law" regarding contractual privity. To the contrary, as discussed above, the court's decision is consistent with the only other decisions addressing privity in the California energy markets. See pp. 11-12, *supra*. While the court characterized those decisions as "[s]ignificant[]" to its holding (Pet. App. 26a), petitioners do not mention them.[3]

Petitioners instead argue (Pet. 17) that the Federal Circuit's "holding on privity of contract conflicts directly with the Eighth Circuit's decision in *Alliant Energy* [v. *Nebraska Public Power District*, 347 F.3d 1046 (2003)]," which held that one contracting party was liable to another as a result of the incorporation of a tariff into a multi-party agreement. See also State Resps. Br. 2. As the court of appeals observed, however, "*Alliant Energy* does not lend support to the notion that buyers and sellers in an energy exchange are in contractual

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[3] Petitioners rely on a different FERC decision regarding the California energy markets in which FERC supposedly rejected the argument that "the Exchanges alone should pursue recovery for non-payment." Pet. 20 (citation omitted). Petitioners take FERC's statement out of context. The FERC decision they cite addressed the situation in which a Scheduling Coordinator (like the agencies here) transacted in the market not on its own behalf, but on behalf of a third party. *Pacific Gas & Elec. Co.*, 81 F.E.R.C. ¶ 61,122, at 61,507-61,509 (1997). FERC stated that if the third party defaulted, it would be the Scheduling Coordinator's responsibility—not the exchange's—to collect the debt. *Id.* at 61,509. That rule makes good sense because the Scheduling Coordinator, and not the exchange, would be in privity with the third party. See *ibid.* ("The purpose of Scheduling Coordinators is to act as an intermediary between the ISO and customers."). Here, the exchanges (and not petitioners) were in privity with the agencies. Thus, the exchanges are the entities, if any, that may sue the agencies to collect alleged overcharges.

privity" merely due to their participation in the exchange. Pet. App. 25a. In fact, the decision never addressed standing or privity at all. Petitioners appear to acknowledge (Pet. 18-19) the absence of such a discussion, but suggest that the Eighth Circuit must have assumed that the parties were in privity with one another based on their participation in the exchange. Even if that were the case, such an assumption would not constitute binding precedent on the jurisdictional question of standing. See *Arizona Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.").

In any event, as the court of appeals correctly noted (Pet. App. 25a), *Alliant Energy* involved a distinct source of privity. Each of the parties there was a member of a voluntary association and a "signatory to the enabling agreement—known as the Restated Agreement"—which "set[] forth the contractual rights and obligations of all [association] members." 347 F.3d at 1048; see *Alliant Energy, Inc.* v. *Nebraska Pub. Power Dist.*, No. 00-2139, 2001 WL 1640132, at *1, *4 (D. Minn. Oct. 18, 2001) (noting that each member of the association was a signatory to the agreement). Thus, the parties in *Alliant Energy* had all signed a common contract with one another. Here, by contrast, the parties signed separate contracts with the exchanges. While the parties in *Alliant Energy* agreed to subject the written agreement among themselves to FERC's authority, it was that common agreement—not their individual agreements

with an exchange—that created privity among the parties.[4]

c. Petitioners also contend (Pet. 19) that the decision below conflicts with decisions of this Court and others addressing the relationships of participants in stock or commodities exchanges, which petitioners claim are "closely analogous to the Exchanges here." See Pet. 19-21. But unlike the Ninth Circuit's decision in *Lynch* or FERC's decision in *Southern California Edison*, petitioners' cases do not address electricity markets at all, let alone the California electricity markets and contracts at issue here. In addition, as stated in one of the decisions on which petitioners rely, *Muh* v. *Newburger, Loeb & Co.*, 540 F.2d 970 (9th Cir. 1976), "[t]he securities industry is somewhat unique in that self-regulation by registered Exchanges is based upon statute." *Id.* at 972 (citation omitted). It is thus a poor analogue for the Cal-PX and Cal-ISO markets.

In any event, petitioners' stock and commodity exchange cases hold only that by agreeing to the rules of a given exchange, the members of the exchange agree that particular provisions—generally, arbitration clauses —will govern their interactions with one another. The disputes in those cases were often based on distinct

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[4] Petitioners state that in *Bonneville*, "the [a]gencies themselves * * * told the Ninth Circuit" that the "[t]he circumstances presented in" *Alliant Energy* were "directly analogous to those presented here." Pet. 18 (brackets in original; emphasis omitted) (quoting Public Entity Pet. Br. at 41, *Bonneville Power Admin.* v. *FERC*, 422 F.3d 908 (9th Cir. 2005) (No. 02-70262), cert. denied, 522 U.S. 1076 (2007)). But the government stated that the circumstances were analogous only insofar as, in both cases, FERC lacked jurisdiction to order non-public utility sellers like the agencies to pay refunds. See Public Entity Pet. Br. at 38-42, *Bonneville*, *supra* (No. 02-70262).

bilateral contracts, such that "the constitution of the stock exchange [was not] itself the source of privity between the parties in suit." Pet. App. 24a; see *Muh*, 540 F.2d at 971-972 (arbitration of dispute under consulting agreement); *Coenen* v. *R. W. Pressprich & Co.*, 453 F.2d 1209, 1211 (2d Cir.) (arbitration of dispute based on agreement for sale of stock), cert. denied, 406 U.S. 949 (1972); *Brown* v. *Gilligan, Will & Co.*, 287 F. Supp. 766, 769-770 (S.D.N.Y. 1968) (same); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *McCollum*, 666 S.W.2d 604, 605-608 (Tex. App. 1984) (arbitration of claims alleging breach of employment contract as well as various torts), cert. denied, 469 U.S. 1127, reh'g denied, 470 U.S. 1024 (1985). The cases therefore do not hold that each member has the right to sue the others for breach of the exchange's rules. In fact, none of petitioners' cited cases involved a claim by one market participant that another market participant breached the exchange agreement.[5]

Petitioners further argue that "this Court long ago recognized that privity of contract exists between the purchaser and seller of stock bought and sold on an exchange, according to that exchange's rules." Pet. 20.

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[5] See *A.G. Edwards & Sons, Inc.* v. *Clark*, 558 So. 2d 358, 361-364 (Ala. 1990) (suit for defamation); *McMahon* v. *Chicago Mercantile Exch.*, 582 N.E.2d 1313, 1315 (Ill. App. Ct. 1991) (member of the exchange sued the exchange itself); *Fayette Tobacco Warehouse Co.* v. *Lexington Tobacco Bd. of Trade*, 299 S.W.2d 640, 642 (Ky. Ct. App.) (former members sued board regarding applicability of rules), cert. denied, 355 U.S. 824 (1957); *Franklin* v. *Dick*, 28 N.Y.S.2d 426, 428 (N.Y. App. Div.), aff'd, 39 N.E.2d 282 (N.Y. 1941) (per curiam) (treasurer of New York Stock Exchange sued trustees of the gratuity fund of the Exchange regarding validity of provision); *Waddell* v. *Shriber*, 348 A.2d 96, 100 (Pa. 1975) (action in equity relating to dissolution of partnership).

In *Clews* v. *Jamieson*, 182 U.S. 461 (1901), however, the parties' agents had specifically agreed to the transaction with one another, and the sales of shares could be traced between them. *Id.* at 482-488. By contrast, here, petitioners cannot trace any of their energy purchases to the agencies specifically, Pet. App. 6a, and, as the court of appeals correctly held, petitioners' agency argument fails. See pp. 18-19, *infra*.

d. Petitioners' other arguments (Pet. 21-24) reduce to the contention that the decision below is incorrect. That is not a basis for certiorari. Sup. Ct. R. 10. Moreover, petitioners' arguments are unpersuasive. For example, petitioners fault the court of appeals for "concluding that Petitioners could be in privity with the exchanges, or with the sellers, but not with both." Pet. 22; see Pet. 24. But the court did not so hold. Instead, it responded to petitioners' argument that they were left without a means to attempt to recoup the alleged overcharges, if any, by pointing out that they could have sued the exchanges. See Pet. App. 18a-19a, 27a-28a. Although petitioners complain that such a remedy is "cumbersome," Pet. 23, their critique does not demonstrate that the decision below is incorrect, much less that certiorari is warranted.[6]

2. a. The court of appeals also correctly rejected petitioners' argument that the exchanges acted as the

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[6] Petitioners suggest that the exchanges were not made parties to the proceedings below because they could not be sued for potential overcharges. Pet. 28. That is incorrect. The trial court expressly declined to "discuss the extent of the CalPX or the ISO's contractual responsibility," holding that even if the exchanges were "contractually bound to recover any alleged over-charges," this is "not the type of interest contemplated" by the court's joinder rules. 07-cv-00157 Mem. Op. 2 n.2, 5 (June 8, 2011).

agents of all participants in the Cal-PX and Cal-ISO markets. Pet. App. 28a-33a; see Pet. 24-26. As the court explained, "[a]n agency relationship 'arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents" to so act. Pet. App. 30a (quoting Restatement (Third) of Agency § 1.01 (2006) (Restatement (Third))). In particular, the court noted, "[a] relationship is not one of agency within the common-law definition unless * * * the principal has the right throughout the duration of the relationship to control the agent's acts." *Id.* at 31a (emphasis omitted) (quoting Restatement (Third) § 1.01 cmt. c). Here, however, there was no agency relationship because "the [agencies] lacked sufficient control over the exchanges," which had "plenary control over * * * setting prices; charging, collecting, and remitting payments; ensuring the transfer of the appropriate amount of energy from each transaction; * * * collecting and remitting money in the event of overpayment," and "issu[ing] instructions, detailing, *inter alia*, settlement and payment obligations to the buyers and sellers." *Id.* at 31a-32a.

b. Petitioners argue that the court of appeals' decision on agency "conflicts with decisions of this Court and long-standing principles of agency law" establishing that "privity exists among parties * * * when they have designated a third party—*i.e.*, an agent—to coordinate a transaction on their behalf." Pet. 24-25. But as just discussed, the court of appeals cited and applied bedrock principles of agency law. See Pet. App. 28a-29a. Petitioners' contention that the court misap-

plied the correctly stated legal standard does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law."); see also *City & Cnty. of S.F.* v. *Sheehan*, 135 S. Ct. 1765, 1780 (2015) (Scalia, J., concurring in part and dissenting in part) (explaining that this Court is "not, and for well over a century ha[s] not been, a court of error correction").

To the extent that petitioners suggest the court of appeals applied the wrong legal standard, that argument fails. Petitioners fault (Pet. 25) the court for requiring them to demonstrate that the agencies had control over the actions of the exchanges. But control is a "basic" requirement of agency law, *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2666 (2013), and is manifested by the ability to give "interim instructions." Pet. App. 31a-32a; Restatement (Third) § 1.01 cmt. f; see also, *e.g.*, *Johnson* v. *Priceline.com, Inc.*, 711 F.3d 271, 278-279 (2d Cir. 2013). Indeed, the two cases on which petitioners rely, *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110 (1954), and *United States* v. *Johnson Controls, Inc.*, 713 F.2d 1541 (Fed. Cir. 1983), both recognized the importance of control to establishing agency. See *Kern-Limerick*, 347 U.S. at 118-121 (discussing *Alabama* v. *King & Boozer*, 314 U.S. 1, 13 (1941)); *Johnson Controls*, 713 F.2d at 1552 (suggesting that control was necessary, but not sufficient, to create agency where government used prime contractor "as a buffer between it and the claims of the subcontractors").

3. In any event, this would be a poor vehicle to address petitioners' arguments about privity of contract and agency because the trial court ruled against petitioners on an alternative ground. The court properly

recognized that even if petitioners possessed standing to pursue their claims, the agencies were not liable. Pet. App. 107a-111a. Petitioners' breach of contract claims depend on their contention that FERC retroactively reset the clearing price for *all* market participants, including the agencies. See, *e.g.*, Pet. 27. As the trial court found, however, FERC could not and did not reset the prices that the agencies charged during the relevant period. Pet. App. 107a-111a; see *City of Redding*, 693 F.3d at 839-840. Accordingly, the predicate for petitioners' breach of contract claims never occurred. To be sure, the court of appeals found it unnecessary to address the trial court's alternative grounds for dismissal. Pet. App. 10a n.2. But because the trial court's liability holding was correct, see *City of Redding*, 693 F.3d at 839-840, even this Court's review and reversal of the court of appeals' decision would not change the outcome in this case.

4. Finally, petitioners argue (Pet. 27) that this Court should grant certiorari "to avoid the potentially destabilizing consequences of the Federal Circuit's decision in this case." Petitioners' argument lacks merit.

Petitioners contend (Pet. 27) that the decision below is "potentially destabilizing" because it precludes holding the agencies liable for the overcharges they supposedly imposed in 2000-2001. See also State Resps. Br. 3-6. As discussed above, however, the trial court correctly recognized that FERC did not reset the rates the agencies charged, and thus, the agencies did not overcharge petitioners. In any event, even if that were not the case, the court of appeals correctly observed that petitioners could have sought relief in a suit against the exchanges that served as their contractual counterparties. Pet. App. 27a-28a.

Moreover, petitioners are wrong to suggest (Pet. 27) that there is a meaningful risk of "destabiliz[ation]" going forward. See also State Resps. Br. 4-5. Congress has specifically addressed the situation that gave rise to petitioners' breach of contract claims. In the Energy Policy Act, Congress amended the Federal Power Act to allow FERC to order the agencies to pay refunds if they "voluntarily make[] a short-term sale of electric energy through an organized market in which the rates for the sale are established by [a FERC]-approved tariff * * * and the sale violates the terms of the tariff or applicable Commission rules." § 1286, 119 Stat. 981 (16 U.S.C. 824e(e)). Although this grant of authority is prospective only, it was enacted to address the potential recurrence of the underlying facts here. See *Bonneville Power Admin.* v. *FERC*, 422 F.3d 908, 921 n.10 (9th Cir. 2005), cert. denied, 552 U.S. 1076 (2007); S. Rep. No. 78, 109th Cong., 1st Sess. 52 (2005) (the amendment would "provide that if an entity described in [S]ection 201(f) voluntarily makes a short-term * * * sale of electricity that violates [FERC] rules, the entity shall be subject to FERC refund authority").[7] In light of Congress's action to substantially address the issue that prompted this suit, further review is not warranted.

[7] In the case of Bonneville, FERC's authority to issue a refund would apply "only if the sale is at an unjust and unreasonable rate" and exceeds the highest just and reasonable rates in the same market area. 16 U.S.C. 824e(e)(4). That is precisely what petitioners allege regarding Bonneville's rates here. Pet. 2.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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