No. 09-288

IN THE

Supreme Court of the United States

PUGET SOUND ENERGY, INC., ET AL.,
Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* AND BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Under Rule 37.2(b) of the Rules of this Court, *amici* law professors move for leave to file the accompanying brief as *amici curiae* in support of Petitioners. Petitioners and the federal Respondents (Bonneville Power Administration and the Federal Energy Regulatory Commission) have consented to the filing of this brief (and letters reflecting their consent have been filed with the Clerk), but counsel for *amici* was not able timely to receive consent from the non-federal Respondents to the filing of this brief, necessitating this motion.

Amici are law professors who teach and write in the area of administrative law. Harold H. Bruff is

the Charles Inglis Thomson Professor of Law at the University of Colorado at Boulder, where he teaches Constitutional Law, Administrative Law, and Separation of Powers. Ronald A. Cass is Dean Emeritus of Boston University School of Law, where he taught Administrative Law; he has also served as Chairman of the American Bar Association's Section on Administrative Law and Regulatory Practice. Ronald M. Levin is the Henry Hitchcock Professor of Law at Washington University School of Law, where he teaches Administrative Law and Legislation. Ernest A. Young is the Alston & Bird Professor of Law at Duke Law School, where he teaches Constitutional Law, Federal Courts, and Administrative Law.

Amici law professors should be granted leave to file the attached *amici curiae* brief.

Respectfully submitted,

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Questions Presented

1. Whether the Ninth Circuit erred in holding that the Federal Energy Regulatory Commission's ("FERC") use of a pre-enforcement evidentiary proceeding to inform its decision whether to enforce § 206 of the Federal Power Act, 16 U.S.C. § 824e, subjected to judicial review that agency's otherwise unreviewable choice not to initiate a § 206 enforcement proceeding.

2. Whether the Ninth Circuit improperly interfered with FERC's discretion to structure its own proceedings in ordering FERC to consider in one proceeding matters that FERC had determined were more properly addressed in a separate and ongoing proceeding.

3. Whether the Ninth Circuit exceeded its authority by rejecting FERC's interpretation of an administrative complaint.

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Interest of *Amici Curiae*[*]

The interest of the *amici curiae* is described in the accompanying motion for leave to file this brief.

Statement

This case raises important issues concerning the authority of courts to review agency determinations not to initiate proceedings as well as agency decisions about how to structure such proceedings. In *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), this Court held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." In the present case, however, the Ninth Circuit critically undermined this principle by holding that an agency's nonenforcement decision becomes reviewable whenever an agency "has made a determination to adjudicate a dispute or take steps towards enforcing a violation of the law, the outcome it chooses is subject to judicial review." *Port of Seattle v. FERC*, 499 F.3d 1016, 1027 (9th Cir. 2007). This vague formulation threatens to trigger judicial review whenever an agency "takes steps" to investigate the circumstances of a complaint before ruling on whether to proceed with enforcement. If that becomes the law in other circuits, agencies will

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[*] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties were provided notice of *amici*'s intention to file this brief on September 30, 2009, and that all parties consented to waiver of the 10-day notice requirement in Rule 37.2(a).

face strong incentives *not* to take investigatory steps that would result in a more informed decision about whether to take enforcement action, and targets of investigations will be unable to rely on agencies' nonenforcement decisions for fear that a court may seize upon some preliminary "step" and reopen the case.

Enforcement discretion extends not only to initiation of a proceeding but also to decisions about how to structure a proceeding. This principle is central to the notion that agencies generally enjoy control over their own dockets. The Ninth Circuit's decision in the present case undermined this bedrock principle by ordering the Federal Energy Regulatory Commission ("FERC") to consider issues in *this* proceeding that it had chosen to address in separate proceedings, and by overruling the agency's construction of the present complaint as confined to a relatively narrow set of issues. This decision threatens the authority of agencies to formulate a coherent regulatory strategy, and it also injects considerable uncertainty into the enforcement process for private parties subject to agency enforcement actions.

Argument

I. The Ninth Circuit's Ruling Directly Undermines this Court's Ruling in *Heckler*.

Section 701(a) of the Administrative Procedure Act ("APA") permits judicial review of agency action "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). The quintessential example of agency action "committed to agency discretion by law" is an agency's refusal to take enforcement action. In that situation, this Court held in *Heckler v. Chaney* that "the presumption is that judicial review is not available." 470 U.S. at 831. That is because "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id.*

In *Heckler*, Texas inmates sentenced to die by lethal injection petitioned the federal Food and Drug Administration ("FDA") to prohibit the use of certain drugs for the purpose of human executions. The FDA Commissioner refused on the ground that the agency lacked jurisdiction over executions and, in any event, that state lethal injection laws posed an insufficient danger to public health to warrant expenditure of the agency's enforcement resources. *Id.* at 824-25. The FDA appears to have rendered its decision not to go forward solely on the basis of the materials submitted in the inmates' original petitions. Frequently, however, agencies wish to inform themselves further before deciding whether to take enforcement action. The present petition presents the question whether such information-gathering

takes the agency's ultimate decision not to proceed to enforcement outside the scope of *Heckler*'s presumption.

Investigatory steps taken prior to an agency's decision not to take enforcement action should not alter the basic presumption of nonreviewability for such decisions. The Ninth Circuit's contrary decision in the present case threatens to upset the settled law under § 701(a) of the APA, to impose perverse incentives on administrative agencies *not* to consider thoroughly the circumstances before deciding not to enforce, and to create unpredictability for the targets of agency investigations.

A. FERC's decision in this case amounted to an unreviewable decision not to initiate enforcement proceedings.

In this case, Petitioners asked FERC to impose a price cap on sales of power into Pacific Northwest markets equivalent to any price cap that FERC might impose on sales of power in California's centralized energy markets. FERC dismissed that complaint. Complications arose, however, after Petitioners first moved for rehearing, then sought to withdraw their complaint on the ground that FERC orders in related proceedings had provided the relief they sought. Various intervenors opposed this motion to withdraw, and FERC issued an order initiating a "separate preliminary evidentiary proceeding" to "facilitate development of a factual record on whether there may have been unjust and unreasonable charges for spot market bilateral sales in the Pacific Northwest." Pet. App. 102a-103a. In other words, the allegations of the intervenors were of sufficient interest that FERC wanted to hear

more before making a decision whether to initiate a refund proceeding under § 206 of the Federal Power Act ("FPA"). After evidentiary proceedings before an administrative law judge ("ALJ"), the ALJ issued a report finding that the prices charged in the Pacific Northwest were not unjust and unreasonable and that a refund proceeding would likely be unworkable. *Id.* at 326a, 369a-370a.

Following the ALJ's report, FERC itself determined not to initiate proceedings under § 206 that could ultimately result in an order requiring refunds. It based that decision not only on the ALJ's conclusion that the relevant prices were not unlawful—a question on which FERC declined to make an explicit finding—but on its conclusion that, even if those prices *were* unlawful, various "equitable factors" weighed against enforcement action. These factors included:

- the fact that "an immense number of transactions [would be] subject to refund in th[e] case," requiring "prolonged time and effort to unravel," and that in many instances it would be "nearly impossible to match a particular sale with its source or to calculate the alleged refund due with precision," *id.* at 398a-399a;
- the involvement in the relevant transactions of a large number of governmental entities over whom FERC lacked jurisdiction to order refunds, *id.* at 394a-395a, 400a; and
- the unfairness of providing refunds to purchasers of power in the spot markets, vis-à-vis other utilities that engaged in a more

> prudent strategy for purchasing power on a long-term basis, *id.* at 397a-398a.

On rehearing, FERC reiterated that it was unwilling to expend "[t]he time and resources that must be devoted to refund calculations," especially when "such relief would arbitrarily remedy only a portion of the regional market." *Id.* at 442a, 436a.

No one disputes that, standing alone, FERC's decision declining to institute a § 206 proceeding on its own motion would have been unreviewable, based as it was on FERC's judgments about the lawfulness of the prices and the equities of the broader situation. That decision involved precisely the "complicated balancing of a number of factors which are peculiarly within [the agency's] expertise" that this Court found in *Heckler*. 470 U.S. at 831. In particular, FERC's consideration of the equities focused on whether enforcing the law against some parties would skew conditions unfairly in the broader market and whether the agency's enforcement resources might be better employed elsewhere.

The question is whether FERC's decision to seek more evidence before reaching that decision requires an opposite result. It would be odd if it did, because it is equally clear that the ALJ's recommendations were not themselves reviewable as they did not constitute final agency action. 5 U.S.C. § 704. Two unreviewable proceedings do not somehow add up to a reviewable one. The proceedings before the ALJ were simply an effort to help the agency make up its mind about whether to take enforcement action. Those proceedings did not somehow change the character of FERC's ultimate decision into a reviewable adjudication on the merits.

The Ninth Circuit held, to the contrary, that, "where FERC has made a determination to adjudicate a dispute or take steps towards enforcing a violation of the law, the outcome it chooses is subject to judicial review." *Port of Seattle*, 499 F.3d at 1027. But this holding ignores the actual character of FERC's decision in this case and is likely to engender confusion concerning precisely what "steps toward enforcing" are sufficient to trigger review. The FPA regulates the initiation of refund proceedings under § 206 with considerable precision. Section 206(a) requires that "[a]ny complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate . . . and the reasons for any proposed change or changes therein." 16 U.S.C. § 824e(a). Likewise, § 206(b) requires initiation of a proceeding to be accompanied by a precise "refund effective date" that importantly determines potential liability for a refund. 16 U.S.C. § 824e(b). All this means that, if FERC's decision to hold evidentiary proceedings before the ALJ in this matter amounted to an actual "determination to adjudicate a dispute" on its own motion, that determination would have been unlawful because it did not satisfy the requirements of § 206(a) and (b). Of course, FERC never intended its request to the ALJ to explore some of the underlying facts to amount to such a determination, and the Ninth Circuit was wrong to equate them.

The Ninth Circuit's alternate suggestion—that the ALJ proceedings amounted to "steps toward enforcing" the law—is of course true in a sense. Those proceedings were intended as a quick look at the facts to help the agency determine whether

concerns about the Pacific Northwest spot market warranted a full refund proceeding under § 206. But many actions are "steps toward enforcing" the law. An agency takes such a step when it accepts delivery of a petition seeking a § 206 petition, or when a commissioner issues a press release expressing concern about conditions in the market or when the agency uses formal or informal processes to obtain information from regulated entities. Even the agency's purely internal deliberations about whether to proceed constitute "steps toward enforcing" the law. Any rule that suspends *Heckler*'s presumption of nonreviewability and renders agencies subject to judicial review whenever they take such steps is likely to engender hopeless confusion about what steps count and what steps do not.

One possible way to alleviate such confusion arises from the Court of Appeals' comment that, "[w]hen an agency *has instituted* proceedings, meaningful standards exist to review what the agency has done." *Port of Seattle*, 499 F.3d at 1027. But the Ninth Circuit confused the ALJ's nonfinal recommendation that the prices were not unjust or unreasonable—which *was* based on an application of the statutory standard and thus the sort of question that a court could review—with FERC's decision not to initiate an enforcement action on its own motion under § 206. The latter decision, which was the only *final* agency action and thus the action actually before the court, was not based on the reasonableness of the relevant rates under the statute but rather on the equitable factors listed above. Those factors were quintessentially *Heckler*-type factors, grounded in the systemic fairness of enforcement and the optimal allocation of the agency's enforcement resources.

See generally Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 745 (1990) (noting that the courts generally refuse to review "agency operations that are closely related to the agency's management of its workload"). If FERC's decision based on those factors would have been nonreviewable in the absence of the ALJ proceeding—as it surely would have been—then the fact that FERC tasked an ALJ to take some evidence on the justness of the rates cannot change the outcome.

The Ninth Circuit may have been concerned that agencies will disguise decisions on the merits as decisions not to enforce, in order to avoid judicial review. That might have been the case if FERC had taken evidence through an ALJ on the justness and reasonableness of the rates, then decided not to initiate a § 206 proceeding on the ground that the rates were just and reasonable. In that scenario, the ALJ proceeding seems to offer an effective but nonreviewable substitute for the § 206 proceeding itself, thereby circumventing the statutory scheme's provision for judicial review. But that is not this case. FERC's ultimate decision not to go forward was based on equitable factors about enforcement resources, not the merits of the claim for a refund, and that conclusion did not critically rely on the ALJ's determination about justness and reasonableness. *See* Levin, *supra*, at 745 (observing that unreviewable enforcement decisions "may not reflect conclusions on the merits of the petitioner's substantive claims"). *Heckler* should be applied with a pragmatic eye to preventing procedural dodges meant to avoid judicial review, but the Ninth Circuit's rule that *any steps* toward enforcement

obviate the presumption of nonreviewability sweeps far too broadly.

B. The Ninth Circuit's novel rule will have perverse consequences for agency decisionmaking and impose uncertainty upon the targets of agency investigations.

Under the Ninth Circuit's ruling, an agency's decision "'not to prosecute or enforce, whether through civil or criminal process,'" is unreviewable *unless* the agency "commit[s] resources" to making that very decision. *Port of Seattle*, 499 F.3d at 1027 (quoting *Heckler*, 470 U.S. at 831)). In addition to being in conflict with the decisions of several other circuits and settled law of this Court, the Ninth Circuit's ruling discourages agencies from devoting resources to careful decisions about enforcement, thereby leading to bad outcomes in what are routinely complex regulatory areas.

As noted, it is plain from the Ninth Circuit's decision that, had FERC simply decided not to enforce § 206 of the FPA at the outset, its decision would not have been reviewable under the APA, in accordance with this Court's decision in *Heckler*. *See* 470 U.S. at 838. Yet, because the Commission recognized that the matter of reasonable energy prices during this time period raised complicated questions, it went beyond its necessary functions and created a separate proceeding to determine whether it should enforce § 206 of the FPA. By holding that FERC's careful actions render its decision not to enforce § 206 reviewable, the Ninth Circuit has encouraged agencies to forgo holding any sort of special proceedings that would enable them to make better decisions to enforce or not. From this point

forward, agencies that are "on the fence" about enforcing a particular provision will know that the best way to avoid judicial review should they decide not to initiate an enforcement proceeding—which may lead, as it did in this case, to protracted judicial proceedings that will undoubtedly take up copious amounts of time and financial resources—is simply to decide not to act to obtain additional information to inform that decision.

Although the fact that such skewed incentives will clearly lead to detrimental results is obvious, it is worth delineating precisely what is at stake for agencies and, in turn, for citizens. At issue in this case alone are hundreds of thousands of energy purchase transactions, in total worth billions of dollars. As we have stated, FERC would have been in a better position before the Ninth Circuit and in terms of managing its dockets and resources had it simply decided, without further investigation into these complex transactions, that enforcement of § 206 was undesirable for any number of reasons. In critical and complicated areas such as energy regulation, the agencies, and accordingly citizens, are better served if they can properly assess the issues they regulate and evaluate whether action is appropriate. To instead reward uninformed decisions not to act is to undermine the usefulness and efficacy of agencies, and to call into question their ultimate decisions.

Finally, the Ninth Circuit's ruling will have negative consequences for targets of agency investigations. If an agency decides not to enforce a particular provision, the private parties that would have been involved in such an action should be able to rely upon that decision and proceed with their

businesses and so forth. If those parties instead believe that a court may come along and undo the agency's decision to refrain from enforcement, they will be in a position of hanging fire—waiting for months if not years for some sort of finality beyond the agency's final determination.

II. The Ninth Circuit's Decision To Direct FERC To Consider Specific Factors on Remand and To Reject FERC's Interpretation of the Complaint Violates Basic Canons of Administrative Law.

The decision whether or not to initiate enforcement proceedings is not the only critical aspect of an administrative agency's enforcement discretion. That discretion also extends to critical aspects of the form that such proceedings should take. Should action against multiple defendants take place through multiple focused actions or in one consolidated proceeding? Which aspects of a multifaceted regulatory problem should be undertaken first? Which complaints initiated by private parties will provide the best vehicle for resolving a particular issue, and which aspects of the relevant disputes should be reserved for other proceedings? All of these decisions are critical elements of the agency's authority to formulate a coherent regulatory strategy. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) ("[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.").

The present case illustrates just how critical these elements of enforcement discretion are. The 2000-2001 energy crisis in California and other

western markets involved hundreds of thousands of transactions, dozens of major private players, multiple governmental jurisdictions, and a variety of natural and human causes. Congress tasked FERC with devising a coherent regulatory response to this crisis, and that task required FERC not only to decide *whether* to act but *how*—which enforcement actions to bring against which entities to consider which issues. The Ninth Circuit failed to respect FERC's choices in this area by ordering FERC to consider certain market manipulation allegations in the Puget Sound proceeding rather than in other proceedings that FERC had already initiated, and by overriding FERC's construction of Puget Sound's complaint to expand the present proceeding beyond the scope that either FERC or the initiating party believed appropriate. In so doing, the Ninth Circuit upset settled principles of administrative law, interfered with FERC's regulatory approach to a particular regulatory problem of massive importance, and deprived private parties of their ability to rely upon an agency's chosen way of framing a dispute.

A. The Ninth Circuit usurped FERC's enforcement discretion by ordering the agency to consider factually distinct allegations that FERC had chosen to consider in separate proceedings.

The Ninth Circuit mandated that, on remand in the present proceeding, FERC must consider allegations of market manipulation by Enron and others submitted late in the present proceeding. It reached that conclusion notwithstanding FERC's statement grounding its decision not to proceed on "the complete record, including the material submitted in the [additional] filings" alleging market

manipulation. Pet App. 419a. The Ninth Circuit was unmoved by FERC's contemporaneous decision to open new proceedings specifically targeted at market manipulation in California and the Pacific Northwest. *See American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003); *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003). That decision disregarded the agency's "inherent power[] . . . to control its own docket." *GTE Serv. Corp v. FCC*, 782 F.2d 263, 274 n.12 (D.C. Cir. 1986).

This Court has held that "[a]n agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities," and that an agency "need not solve every problem before it in the same proceeding." *Mobil Oil Exploration & Producing Southeast Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230-31 (1991). Just as a prosecutor may choose to charge multiple defendants in the same proceedings, or to prosecute individuals in separate proceedings, or even to let some potential defendants go in order to concentrate on more pressing targets, so too an enforcement agency enjoys broad and often unreviewable discretion to shape its enforcement agenda. The fact that a reviewing court might have chosen to organize the proceedings differently is no basis for judicial interference with the choices the agency actually made.

The Ninth Circuit seemed to think that, once it had determined to review FERC's decision at all, that determination exhausted the relevance of *Heckler* and § 701(a). The Court of Appeals' decision thus may well be taken to stand for the proposition that *only* bare decisions to enforce or not enforce at all come within *Heckler*'s presumption of

nonreviewability. But that would read *Heckler* far too narrowly. Certainly the FPA provides no standards limiting the discretion of the agency to separate issues into multiple proceedings; there is, under § 701(a), "no law to apply," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), on that question.

Moreover, the agency's decision whether to separate issues into multiple proceedings or to combine them in one is likely to rest on the same sorts of grounds as a decision not to bring an enforcement action in the first place. *See Heckler*, 470 U.S. at 831-32 (listing considerations behind a decision not to enforce). Separate proceedings may permit more efficient use of the agency's resources by focusing particular proceedings on particular issues. Likewise, separate proceedings may further goals of systemic fairness by permitting the agency to group those parties who are most similarly situated. All of these considerations are within the expertise of the agency, and courts have no comparative advantage that would warrant second-guessing the agency's decisions in this regard.

B. The Ninth Circuit improperly failed to defer to FERC's construction of Puget Sound's complaint.

As demonstrated in Petitioners' brief, other courts have consistently deferred to an agency's judgment as to how best to construe a party's complaint filed with the agency. The most obvious reason is simply that the agency, dealing as it does with such complaints on a day-to-day basis, will generally have greater expertise on such questions than the reviewing court. But, to the extent that a complaint

genuinely is ambiguous, the decision to construe it narrowly or broadly takes on the more general trappings of other decisions about the scope and structure of agency litigation. Such decisions thus likewise fall within the enforcement discretion of the agency recognized in *Heckler* and § 701(a).

The present case is illustrative. Petitioner Puget Sound Energy, Inc. initially filed a narrow complaint seeking no refund at all, but rather a prospective price cap to guard against a "whipsaw" effect should FERC decide to cap prices for energy sold into California's centralized markets but not prices for energy bought to serve demand in the Pacific Northwest. Later intervenors, which never filed their own complaints, sought to add claims for refunds to Puget Sound's complaint, and still later certain intervenors introduced evidence of market manipulation. Even assuming that Puget Sound's complaint was ambiguous, it was within the discretion of FERC to conclude that that complaint did not provide the right context for addressing this broader set of issues.

Just as this Court must choose the best "vehicle" for deciding a particular issue from among different cases presented for its review, so too an administrative agency needs a certain degree of discretion to choose whether or not to confront a particular issue in a particular case. This retail discretion concerning which issues to address within a case parallels the agency's undisputed discretion not to pursue a case at all. As in the latter situation, the relevant statutes provide no directive to construe complaints narrowly or broadly, and the relevant considerations are similar to those in *Heckler* itself. Respect for the agency's enforcement discretion is

thus best reflected in a strong principle of deference to an agency's construction of the complaint before it.

C. The Ninth Circuit's ruling will create gross inefficiencies for agencies and harm the targets of agency investigations.

The Ninth Circuit's rejection of FERC's interpretation of the administrative complaint and its directive to consider specific factors on remand not only violates settled law, but will no doubt have perilous consequences for agency decisionmaking and the targets of agency investigations.

First, the Ninth Circuit's decision permits, and even directs, courts to engage in the micromanagement of basic agency decisions such as how to structure enforcement proceedings. The law is clear that agencies should maintain control over these decisions, precisely because, based upon their expertise, they are best-suited to make them. Appellate courts, with little to no knowledge about the competing needs for resources of particular agencies, will only create gross inefficiencies if they are allowed to direct agencies to rethink the kind of basic decisions they are entrusted with making every day.

Second, beyond creating a basic inefficiency by permitting courts to undertake the micromanagement of decisions about which they have no expertise, the Ninth Circuit's ruling will lead to further inefficiency by causing agencies to act "defensively." That is, if agencies are aware that their decisions can later be meddled with by unknowledgeable courts, they will likely act preemptively and structure their decisions in ways to insulate them from future judicial

direction. Because such decisions will not be based solely on the most appropriate way to regulate an agency's given area, they will necessarily undermine the efficiency of the regulatory regime.

Finally, the Ninth Circuit's ruling will harm not only agencies, but also the targets of agency investigations. Private parties who may be the targets of or otherwise involved in an agency enforcement action need to be able to rely on the agency's decision to structure proceedings in a particular way. Parties interested in market manipulation allegations, for instance, might well have decided to participate in FERC's proceedings devoted to that issue, rather than in the present proceeding. The targets of agency action should be able to confine their submissions to the issues raised by an agency in a particular proceeding without having to worry that a reviewing court may choose to reconfigure the proceedings long after the fact. The Ninth Circuit's ruling substituting its own ideas about structuring the proceedings directly undermines this principle.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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