No. 09-288

IN THE
Supreme Court of the United States

PUGET SOUND ENERGY, INC., AVISTA CORPORATION, AVISTA ENERGY, INC., CONSTELLATION ENERGY COMMODITIES GROUP, INC., IDACORP ENERGY L.P., MORGAN STANLEY CAPITAL GROUP INC., PORTLAND GENERAL ELECTRIC COMPANY, POWEREX CORP., SEMPRA ENERGY TRADING LLC, SHELL ENERGY NORTH AMERICA (US), L.P., AND TRANSCANADA ENERGY LTD.,
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

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENTS

Petitioners' Statements pursuant to Rule 29.6 were set forth at pages v-x of the petition for a writ of certiorari, and there are no amendments to those Statements.

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I. THE NINTH CIRCUIT'S HOLDING THAT FERC'S ACTIONS IN THIS CASE ARE REVIEWABLE WARRANTS THIS COURT'S REVIEW

In *Heckler v. Chaney*, 470 U.S. 821 (1985), this Court held that "an agency's decision not to take enforcement action" is "presumptively unreviewable." *Id.* at 832; *see* 5 U.S.C. § 701(a)(2). None of the respondents here defends the Ninth Circuit's broad holding that a non-enforcement decision *is* reviewable whenever the agency "take[s] steps towards enforcing a violation of the law" or "commit[s] resources to an examination of whether" enforcement is "warranted." Pet. App. 18a. Nor does any respondent deny that this novel standard conflicts with the standard numerous other courts of appeals apply.

The Government nevertheless contends that the specific procedures FERC employed to inform its decision not to enforce § 206 make that decision not to act reviewable, notwithstanding FERC's contrary position when it elected to use those procedures and in arguing to the court below. The Government's current position only deepens the existing confusion over when agencies may invoke and courts should apply *Heckler*, which rests not on *how* the agency chooses to inform its exercise of discretion, but on *whether* the decision is committed to the agency's discretion by law. As at least four courts of appeals have held, *Heckler* does not turn on the procedures an agency employs in reaching a decision not to enforce.

1. FERC's orders at issue here undisputedly reflected FERC's decision not to initiate its own, prosecutorial enforcement action under § 206 of the Federal Power Act ("FPA"), 16 U.S.C. § 824e. As the Government concedes, "[i]n July 2001, acting on its own initiative, [FERC] instituted a separate proceed-

ing to consider past spot-market sales in the Pacific Northwest," but "[FERC] did not invoke 16 U.S.C. 824e to determine whether to change the rates on file." Gov't Br. 4. Indeed, FERC expressly declined to decide whether the rates were unreasonable. *See* Pet. App. 392a-393a. Such a determination lies at the core of FERC's authority under § 206; therefore, FERC could not have exercised its ancillary power to order refunds "in excess" of the just-and-reasonable rate without first "institut[ing] a proceeding" to determine the just-and-reasonable rate. 16 U.S.C. § 824e(b). In its orders here, FERC thus accurately characterized its action as a "decision not to enforce," expressly invoking *Heckler* to support its inaction. Pet. App. 402a n.64.

The Government – reversing FERC's position in its orders and in the court below – now implausibly asserts that FERC resolved claims that buyers in the PNW were entitled to refunds as though FERC had conducted and completed a formal § 206 proceeding to determine whether prices were unjust or unreasonable. *See* Gov't Br. 10; *accord* Resp. Br. 16.[1] Such a ruling would have been unlawful because FERC did not comply with the statutory requirements of § 206. *See* Law Profs. Br. 7. Following FERC's "review of [its own] motion," FERC did not "fix by order the time and place" of a § 206 hearing, "specify the issues to be adjudicated," or "establish a refund effective date." 16 U.S.C. § 824e(a), (b). Indeed, FERC consistently and expressly declined to set a hearing pursuant to § 206. *See* Pet. App. 102a-103a, 382a, 417a, 424a. Instead, FERC explained its decision *not*

[1] None of the cases respondents or the court below cite as examples of courts reviewing FERC's refund decisions involved a FERC decision not to initiate a § 206 proceeding. *See* Pet. App. 19a; Gov't Br. 10; Resp. Br. 17 n.6.

to undertake an enforcement proceeding. That decision was a classic exercise of FERC's prosecutorial discretion, based on FERC's conclusion that it was not possible to achieve "an equitable resolution of the matter" even if a subsequent § 206 proceeding were to find the rates in question to be unjust or unreasonable, *id.* at 401a-402a, and that "[t]he time and resources" required even to attempt such a resolution could not be justified by the likelihood of success, *id.* at 442a.

The non-federal respondents attempt to draw a line between FERC's "investigations" and its "adjudications." *See* Resp. Br. 14 & n.5, 16, 21 n.8. But nothing in the form of FERC's proceedings here suggests FERC was rendering a decision on the merits under § 206. As FERC itself explained, the preliminary evidentiary proceeding was to gather "additional information before making a decision" whether to proceed to enforcement, Pet. App. 425a, and to "assist[] [FERC] in understanding the Pacific Northwest spot market and the proper action to be taken," *id.* at 390a. Contrary to the non-federal respondents' suggestion (at 16), the fact that the agency provided participants with what it characterized as "additional as well as unusual process to determine whether the proceeding should continue" (Pet. App. 417a) does not change the nature of FERC's decision.

2. Respondents thus focus on the manner in which FERC informed its exercise of discretion. *See* Gov't Br. 9-10; Resp. Br. 14-15. Although both respondents' briefs chronicle the nature of FERC's proceedings below, neither offers an argument why FERC's use of *any* particular procedure subjects to judicial review the otherwise discretionary decision not to enforce § 206. The Government states only that FERC's proceeding "had much in common with

adjudicatory proceedings that usually are subject to judicial review." Gov't Br. 10; *see* Resp. Br. 16-17.

As petitioners explained – in analysis that neither respondents' brief challenges – respondents' position finds no support in *Heckler*. *See* Pet. 17-18. This Court has held that an agency's decision not to exercise its enforcement authority is reviewable only if "meaningful standards" exist "for defining the limits of [the agency's] discretion." *Heckler*, 470 U.S. at 834-35. Whether a court has "law to apply" (*id.* at 834) in reviewing an agency's exercise of enforcement discretion does not depend on the procedures an agency utilizes to inform that discretion. Respondents offer no standard for determining the circumstances in which FERC must act on its own motion to enforce § 206.[2]

Proceeding from the mistaken (and unsupported) premise that FERC's use of a public hearing to inform its discretion whether to launch a § 206 enforcement proceeding is a reviewable "adjudication" regardless of whether there is law to apply, respondents deny any conflict between this case and those in which other circuits have held that an agency's choice of procedure does not subject to judicial review its discretionary decision not to enforce. Respondents argue that the latter cases did not "involve[] the kind of formal adversarial proceedings at issue here," Gov't Br. 11, or "entail[] an adversary proceeding of the kind FERC conducted here," Resp. Br. 18. But the Ninth Circuit departed from other circuits'

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[2] Contrary to the non-federal respondents argument (at 20 n.7), the "just and reasonable" standard of § 206 did not furnish "law to apply" because FERC never addressed the reasonableness of the rates. *See* Pet. App. 424a. The ALJ's recommendations on that point, moreover, did not constitute final agency action; FERC did not adopt them.

correct implementation of *Heckler* by holding that *any* choice of procedure could subject an agency's decision to review. *See* Pet. App. 18a-19a.

In *Greer v. Chao*, 492 F.3d 962 (8th Cir. 2007), by contrast, the Eighth Circuit held that "the manner in which an agency opts to investigate a complaint is largely a matter left to the agency's discretion." *Id.* at 965. Similarly, the D.C. Circuit consistently has held that an agency's use of pre-enforcement procedures, such as a "show cause" order and subsequent proceedings, does not overcome the presumption against review of decisions not to enforce absent some contrary indication in the substantive statute. *New York State Dep't of Law v. FCC*, 984 F.2d 1209, 1215 (D.C. Cir. 1993); *see Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 460 (D.C. Cir. 2001) (holding decision not to enforce following four-year "formal" investigation unreviewable because Natural Gas Act "lacks guidelines against which to measure FERC's exercise of its discretion"). Other cases are in accord. *See Sierra Club v. Larson*, 882 F.2d 128, 132 (4th Cir. 1989); *Sherman v. Black*, 315 F. App'x 347, 349 (2d Cir. 2009).

Under the law in those four circuits, this case would have been decided on the FPA's text alone, and FERC's decision not to enforce § 206 would have been held unreviewable because that statute does not constrain FERC's discretion to undertake enforcement actions on its own motion. *See* Pet. 19-20. Respondents advance no contrary argument.

3. The Ninth Circuit's decision will imperil well-informed agency decisionmaking by creating "skewed incentives" for agencies *not* to collect information prior to deciding whether to enforce a statute. Law Profs. Br. 11. Agencies will face a choice between justifying decisions not to enforce with enough detail

to withstand judicial review and eschewing any public "steps" to gather information, lest they subject their non-enforcement decisions to such review. And the decision below threatens targets of agency investigations with legal jeopardy long after the agency has chosen not to take action.

Contrary to the non-federal respondents' argument (at 19-20), such confusion results whether the Ninth Circuit's opinion is given a broad or a narrow reading. The Government's brief here well demonstrates that confusion. The Government declines to defend the Ninth Circuit's bright-line test, instead arguing that it is consistent with *Heckler* for a court to review any agency "adjudicatory proceeding," Gov't Br. 9; "trial-type evidentiary hearing[]," *id.* at 9-10; "public, trial-type fact-finding proceeding," *id.* at 11; or "formal adversarial proceeding[]," *id.* The Government does not define any of those formulations in the context of pre-enforcement agency action. Yet federal agencies have invoked *Heckler* in a wide variety of circumstances in recent or pending cases upon which the Government now casts suspicion (without explaining how other agencies should act). *See, e.g.*, Brief of Appellees at 18-19, *Heide v. Scovel*, No. 09-1173 (8th Cir. filed Apr. 22, 2009) (arguing that Department of Transportation decision not to enforce following investigation and report by its Inspector General was unreviewable, citing *Greer*); Final Brief for Respondents at 28, 41-42, *Sierra Club v. EPA*, 557 F.3d 401 (6th Cir. 2009) (No. 07-4485) (arguing that Environmental Protection Agency denial of petition relating to permitting was "functional[ly] similar[]" to exercise of prosecutorial discretion and that judicial review would "render[] illusory the repose and finality" of agency action); Gov't Defs.' Opp. to Pls.' Mot. for Summ. J. at 10, *King v. Office for Civil Rights*, 573 F.

Supp. 2d 425 (D. Mass. 2008) (Civ. A. No. 07-10861-PBS) (arguing that agency decision to terminate investigation was unreviewable because "OCR's exercise of judgment about what information is necessary to determine whether [to enforce] is within OCR's discretion"). The Ninth Circuit's decision – and the Government's gloss on that decision – creates significant uncertainty for all federal agencies, which now do not know whether to follow their existing pre-enforcement practices or the vague direction offered in the Government's brief. This Court should grant certiorari to resolve that confusion.

II. THE NINTH CIRCUIT'S RULINGS ON THE SCOPE OF FERC'S PROCEEDINGS WARRANT FURTHER REVIEW

The Government agrees that the Ninth Circuit erred in interfering with FERC's discretion to structure its own proceedings (Question Presented No. 2) and in overturning FERC's interpretation of the Puget complaint (Question Presented No. 3). The non-federal respondents have no persuasive argument to the contrary. Although the Government contends that review nevertheless is unwarranted, this Court has often granted certiorari to articulate the correct principles of federal administration, rather than leaving FERC to correct case-specific errors on remand.

1. The Government agrees that the Ninth Circuit exceeded its authority in ordering FERC to reconsider allegations of market manipulation that FERC already had addressed in separate enforcement proceedings. That ruling runs afoul of *Mobil Oil Exploration & Producing Southeast v. United Distribution Cos.*, 498 U.S. 211 (1991), and is inconsistent with post-*Mobil Oil* circuit cases (*see* Pet. 26-28).

The non-federal respondents incorrectly argue (at 22-23) that those other FERC enforcement proceedings did not consider the manipulation allegations made in the PNW proceeding. But the evidence submitted in the reopened PNW proceeding concerned manipulation in the California markets, and, as the Government notes, the separate enforcement proceedings included PNW sellers. *See* Gov't Br. 5.

The non-federal respondents next argue that FERC failed to rely on *Mobil Oil* in its orders. *See* Resp. Br. 23-24. But the Court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). In this case, as the Government explains (at 5, 12-13), "read[ing] together" FERC's multiple orders of June 25, 2003, "adequately ground[s]" FERC's exercise of discretion to structure the complicated dockets arising out of the California energy crisis as it deemed best. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004).

In all events, the non-federal respondents have no answer to petitioners' showing (at 24) that the allegations of market manipulation, even if proved, were irrelevant to FERC's equitable determination that refunds would be inappropriate.

2. The Government also agrees that the Ninth Circuit erred by failing to give proper deference to FERC's interpretation of Puget's complaint. *See* Gov't Br. 15. The Ninth Circuit's contrary interpretation does not withstand scrutiny. *See* Pet. 31; Gov't Br. 16.

Nevertheless, both the Government (at 16-17) and the non-federal respondents (at 26-27) erroneously assert that there is no conflict between the Ninth

Circuit's approach to interpreting this administrative complaint and the D.C. Circuit's well-established practices. Although the Ninth Circuit stated that it was "mindful" of the principle that it "owe[d] deference to FERC's interpretation of the scope of Puget's complaint," Pet. App. 31a, the court made no attempt to discern the "key element[s]," *Burlington Northern R.R. Co. v. ICC*, 985 F.2d 589, 594 (D.C. Cir. 1993), or the "entire thrust," *American Fed'n of Gov't Employees v. FLRA*, 796 F.2d 530, 533 (D.C. Cir. 1986), of the complaint, as the D.C. Circuit does. The court's citation of deference decisions does not make up for its failure even to mention, much less apply, the *analysis* of administrative complaints that forms the basis for the D.C. Circuit's deferential standard. Indeed, the Ninth Circuit's formalistic approach to interpreting administrative complaints squarely conflicts with the D.C. Circuit's contextual analysis.

Finally, the non-federal respondents do not seriously dispute petitioners' argument (at 32-33) that the Ninth Circuit undermined the notice that is an essential component of the rule against retroactive ratemaking. The court below subjected petitioners to potential refund liability – without the advance notice required for refunds under § 206 – for transactions alleged by the non-federal respondents to be worth more than $1 billion. *See* Pet. 34.[3]

3. Although the Government acknowledges that the Ninth Circuit erred, it maintains that review is premature. This case thus represents the latest in a series of California energy crisis cases in which the

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[3] The Ninth Circuit's ruling regarding where those sales occurred is not a "threshold" question. Gov't Br. 15 n.2. Properly interpreted, Puget's complaint encompassed purchases for ultimate consumption in the PNW only; the sale location is therefore irrelevant. *See* Pet. 30-31.

Government has rationalized Ninth Circuit errors that favor California purchasers on the asserted ground that FERC can fix those errors on remand. In *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*, 128 S. Ct. 2733 (2008), this Court granted certiorari petitions by electricity sellers (and then reversed the Ninth Circuit's interpretation of the *Mobile-Sierra* doctrine) notwithstanding the Solicitor General's arguments that the decision below (a) was limited to "the highly unusual context of the 2000-2001 western energy crisis" and (b) "allow[ed] [FERC] sufficient discretion on remand to consider all relevant factors." 06-1454 *et al.* Gov't Br. 12.[4]

In this case, too, the Government invokes (at 9) the "highly unusual" nature of the California energy crisis to urge the Court to deny review. But this Court should not tolerate the Ninth Circuit's attempt to develop a set of crisis-specific administrative principles that consistently tip the scales in favor of California electricity purchasers.

Any effort to limit those principles to the California energy crisis also is unlikely to succeed. Federal agencies frequently conduct complex, nationwide administrative proceedings that involve a wide variety of actors and economically challenging circumstances. If the Ninth Circuit's rulings are allowed to stand, those actors will labor under uncertainty about whether their proceedings will be considered sufficiently "unusual" to warrant throwing out tradi-

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[4] Last Term, the Court granted certiorari in *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 129 S. Ct. 2050 (2009), notwithstanding the Solicitor General's argument that FERC could apply the court of appeals' incorrect standard in a way that would mitigate any relevant "policy concerns." 08-674 Gov't Br. 9.

tional standards of administrative deference in favor of this new body of "crisis" law.

The Ninth Circuit's rulings also stymie FERC's efforts to conclude the various proceedings arising out of the California energy crisis. Although the Ninth Circuit rightly "did not dictate what steps [FERC] must take on remand and did not hold that refunds would ultimately be required," Gov't Br. 14, the court expressed skepticism of the agency's ultimate conclusion, "urg[ing] [FERC] to further consider its decision[] on remand" in light of the Ninth Circuit's other energy-crisis-specific decisions. Pet. App. 36a. And, through the Ninth Circuit's decision to consolidate all California energy crisis FERC appeals before one three-judge panel without granting any en banc review, this case will remain under the supervision of the same panel that currently has pending hundreds of petitions for review of this and related FERC orders. Finally, the fact that a closed proceeding has now been reopened with a vastly greater scope and an additional $1 billion in alleged liability demonstrates sufficient prejudice to petitioners to warrant this Court's review.

In sum, this Court's review is urgently needed to restore normalcy to the administrative process for the energy crisis cases and to enable FERC to resolve the legal uncertainty that surrounds billions of dollars of transactions that took place almost a decade ago.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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