No. 09-343

IN THE
Supreme Court of the United States

EDISON ELECTRIC INSTITUTE; AMERICAN PUBLIC POWER ASSOCIATION; NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION; AMERICAN WIND ENERGY ASSOCIATION; ALLEGHENY POWER; TRANS-ALLEGHENY INTERSTATE LINE CO.; AND SAN DIEGO GAS & ELECTRIC CO.,
Petitioners,

v.

PIEDMONT ENVIRONMENTAL COUNCIL, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL STATUTES

Blank Page

REPLY BRIEF FOR PETITIONERS

Respondents attempt to downplay the significance of this case and argue that the Fourth Circuit correctly held that Section 216 of EPAct 2005 does not grant FERC backstop siting authority over state denials of applications to construct electric transmission facilities. But the Solicitor General's brief, along with the *amicus* briefs from the FERC Commissioners who served from 1993-2009 and the Chamber of Commerce, confirm that the scope of FERC's backstop authority is, indeed, "important" to national energy policy and even implicates "national-security concerns." SG Br. 13-14; *see also* Former FERC Comm'rs Br. 6-18; Chamber Br. 5-11. Those briefs also make clear that the Fourth Circuit's interpretation of the statute is erroneous.

That leaves as the only potential justification for denying review the Solicitor General's suggestion that this Court should forego review for prudential reasons. But none of the Solicitor General's arguments in this respect justifies allowing the Fourth Circuit's decision to stand. It is very difficult, if not impossible, to imagine this Court having another opportunity to address this issue. And any infirmity in the Fourth Circuit's exercise of jurisdiction simply provides additional reason for this Court's intervention. It does not counsel allowing such an important and harmful decision to stand.

1. Respondents dispute the importance of this case on two grounds. Neither is persuasive.

First, respondents contend that "this case does not present an important question of Federal law" because it involves a "straightforward application of *Chevron U.S.A. v. Nat. Resources Def. Council*, 467 U.S. 837 (1984)." BIO 12. But this argument misapprehends the reason why review is necessary. The point of the petition is not to seek an elaboration in *Chevron* jurisprudence. Rather, the petition asks this Court to resolve the meaning of Section 216 of EPAct 2005. And this Court regularly grants review of these kinds of statutory interpretation questions, even when their resolution does not promise to establish any new canon of statutory construction or to revise the *Chevron* framework. *See, e.g., New York v. FERC*, 535 U.S. 1, 16 (2002) (*certiorari* granted "[b]ecause of the importance" of the FERC rulemaking at issue); *see generally Coeur Alaska, Inc. v. Southeast Alaska Cons. Coun.*, 129 S. Ct. 2458 (2009) (applying *Chevron* analysis to Clean Water Act issue); *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009) (same); *Global Crossing Telecom., Inc. v. Metrophones Telecom., Inc.*, 550 U.S. 45 (2007) (same respecting Communications Act issue).

Second, respondents assert that transmission siting is not very important because economics and market structure play a larger role in the development of transmission infrastructure. BIO 26-27. But as the Solicitor General and the *amici* explain, "difficulty in siting new transmission facilities – and, in particular, difficulty in obtaining

state regulatory approval for such siting – *is* a significant factor contributing to inadequate investment in transmission infrastructure." SG Br. 12 (emphasis added); *see also* Former FERC Comm'rs Br. 10-18; Chamber Br. 9-10.

Contrary to respondent's suggestion (BIO 25-26 & n.7), state *denials* are just as much of an obstacle in this respect as are delays and unreasonable conditions. As the Solicitor General explains, the Fourth Circuit's decision allows "any State, simply by denying a permit to site or construct transmission facilities, to derail the multi-state transmission projects necessary to assure reliability in national interest corridors, regardless of how important those projects may be to the national interest in relieving congestion on the interstate grid." SG Br. 12. That is why the National Energy Policy proposal that led to EPAct 2005 specifically targeted "state *rejections* of transmission projects as a causal factor in transmission constraints." Former FERC Comm'rs Br. at 20 (citing examples). Excluding state denials from FERC's backstop authority would create a gaping loophole – allowing states to evade EPAct 2005's goal of preventing state commissions from thwarting national transmission siting interests.

Respondents say that this loophole will merely incentivize industry to work closely and cooperatively with state authorities. BIO 29. But that is exactly the system Congress decided was broken and needed to be changed, because state authorities all too often consider only local interests. Former FERC Comm'rs Br. 17, 20. The states, no doubt, have a preference for the "status quo ante."

Id. at 27. But they cannot reasonably challenge Congress's decision that it was important to change the status quo.[1]

2. Respondents' attempt to defend the Fourth Circuit's decision is unconvincing. As the Solicitor General explains, FERC's interpretation of Section 216 "represents the most natural reading of the statutory text, best harmonizes all of the provisions of the statute, and most effectively promotes the congressional purpose." SG Br. 7.

a. *Text.* Echoing the Fourth Circuit's majority, respondents argue that the word "withheld" in the statutory phrase "withheld approval" is a "continuous" term, while a "denial" is "instantaneous." BIO 13, 20. Not so. The act of "withholding" can be based on a particular event, as when one speaks of consent being "unreasonably withheld." Chamber Br. 13. In any event, respondents have no answer for the fact that the word "withheld" precedes "approval," not a word such as "action" or "decision." Denying an application is unquestionably a form of withholding approval. "[D]enial is the opposite of approval." SG Br. 8.

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[1] Respondents also suggest at the end of their filing that it is not necessary to address the question presented now because energy policy is generally "in flux" and Congress is considering new legislation concerning "renewable energy facilities." BIO 29. But given the importance of energy to our modern economy, Congress will probably always be considering energy legislation of one form or another. That reality provides no reason to deny review concerning legislation that has actually been enacted.

b. *Statutory structure and purpose.* Respondents' more generalized arguments fare no better. Respondents first argue that there is no reason that Congress would have been concerned with state denials, because such decisions are reviewable in state courts. BIO 10. The Fourth Circuit did not rely on this rationale, and for good reason; it ignores the fact that state commissions' denials that thwart federal interests are often *consistent* with state law and thus cannot be disturbed on appeal in state courts. *See* National Energy Policy Dev. Group, National Energy Policy, at 7-7 (2001) ("Some state siting laws require that the benefits of a proposed transmission facility accrue to the individual state, resulting in the rejection of transmission proposals that benefit an entire region, rather than a single state."); Former FERC Comm'rs Br. 17 n.15 (citing examples of this phenomenon).

Respondents also suggest that allowing FERC to override state denials of permits would upset a carefully calibrated federal/state balance. BIO 4-5, 15-16. But contrary to respondents' suggestions, FERC's rule does not prevent states from playing a significant role in siting decisions in National Interest Corridors. States retain the power to consider applications in the first instance and to enforce state requirements that do not conflict with national energy policy. *See* Pet. 18. Even with respect to assessing federal considerations, the mere fact that one decision-making body's work is reviewable by another hardly renders the first body's work "futile." Pet. App. 20a. A federal district

court's work is not futile simply because it is reviewable in a federal court of appeals.

c. *Statutory history.* Respondents argue that early drafts of the legislation that became EPAct 2005, which separated the concept of "withholding" approval from "delaying" approval, support reading the two terms to mean the same thing. BIO 3-4. But just the opposite is true; this history shows that Congress always understood the term "withheld" to mean more than merely delaying issuance of a decision. *See* Former FERC Comm'rs Br. 21-26. Congress's decision to drop the "delaying" phrase from the final legislation shows that it understood the "withholding approval" phrase to cover both denials and delays.

d. Chevron *analysis.* Finally, respondents attack petitioners' deference argument in two ways. First, they protest that "[a]n appellate court dissent does not create statutory 'ambiguity' entitling an agency to judicial deference." BIO 21. That may be true, but no one is making that argument here. Instead, petitioners are merely making the common-sense observation that when federal judges construe statutory language in diametrically opposite ways, that is a data point suggesting the statute at issue is ambiguous. Pet. 20; *see also* Chamber Br. 13-14. The cases petitioners cite speak for themselves in this regard.

Second, respondents assert that *Chevron* deference is appropriate only when the agency at issue brought its expertise to bear in the order at issue. BIO 23-24. Again, this may be true, but it

does not help respondents. FERC clearly brought its expertise to bear when it decided how far its backstop siting authority needed to extend to be able to break logjams at the state level that thwart national energy policy.

3. The Solicitor General suggests that even though the Fourth Circuit's decision misconstrues a vital component of our national energy policy – and thus "could have serious consequences" – this Court's review "is not warranted at this time" for two prudential reasons. SG Br. 12, 14. Neither purported reason withstands scrutiny.

a. The Solicitor General first suggests that this Court will have other opportunities to examine whether FERC's backstop authority covers state denials of permit applications. According to the Solicitor General, "[i]f a party seeking to build a transmission facility in a national interest corridor outside the Fourth Circuit were to seek a permit from FERC after having been denied a permit by a State," FERC would be free to agree or disagree with the Fourth Circuit's decision, and review from that decision would be possible in a federal court of appeals. SG Br. 15.

This is a puzzling suggestion on several levels. As an initial matter, this case represents a consolidated action under 28 U.S.C. § 2112 of petitions for review from the Second, Fourth, and D.C. Circuits. *See* Pet. 8-9. The whole point of such consolidated actions is "centralizing . . . judicial review and avoiding conflicts which might obtain if the parties could go to any court that had venue."

Penn-Central Merger and N&W Inclusion Cases, 389 U.S. 486, 544 (1968) (Douglas, J., dissenting in part). Thus, courts have held that a circuit that hears a consolidated challenge to an agency rule is the "sole forum for addressing challenges to the validity of the [rule]." *GTE South, Inc. v. Morrison*, 199 F.3d 733, 743 (4th Cir. 1999); *accord US West Comm., Inc. v. Hamilton*, 224 F.3d 1049, 1054 (9th Cir. 2000).

Even apart from the nature of consolidated challenges to agency orders, petitioners are at a loss to understand how FERC could disregard the Fourth Circuit's decision even in a case arising outside that jurisdiction. FERC was a party in the Fourth Circuit and thus is seemingly bound by the Fourth Circuit's decision invalidating FERC's construction of Section 216. For example, in *Atlantic City Elec. Co. v. FERC*, 329 F.3d 856 (D.C. Cir. 2003), FERC decided to continue enforcing an order that the D.C. Circuit had held conflicted with a federal statute. The D.C. Circuit had little patience for FERC's explanation that it "still believed it was correct the first time," stating: "If FERC thinks we are wrong, then like any other litigant, it may petition for *certiorari* to the Supreme Court of the United States. Absent such a petition and the issuance of *certiorari*, in an order by the Supreme Court, FERC is bound by our decision." *Id.* at 859. The Solicitor General provides no reason to think that the same reasoning does not hold here. *See* Pet. 22.

To the extent the Solicitor General is suggesting that a utility company could generate a new case by seeking review in a different federal court of appeals from a future FERC order refusing

to exercise backstop siting authority respecting a state denial of a permit, there are at least two difficulties with that suggestion. First, the Solicitor General ignores the enormous amount of resources a utility company must invest to prepare, present, and pursue a permit application. *See* Pet. 21. If the Fourth Circuit's decision is left in place, it is highly unlikely that any utility company will be willing to pursue to FERC and the courts an application denied by a state commission, based simply on the hope that after spending millions of additional dollars and enduring additional years of administrative procedures and litigation, a different court of appeals will disagree with the Fourth Circuit and send the matter back to FERC for still further proceedings. It would be infinitely better – not to mention infinitely more consistent with EPAct 2005's purpose of spurring prompt development in National Interest Corridors – to definitively resolve proper interpretation of the Act here and now, without triggering years of substantial doubt as to the rights of developers and states.

Second, even if a utility company initiated a new case that resulted in a state denial and ultimately challenged in another federal court of appeals FERC's refusal to consider exercising backstop siting authority over the denial, the legal question this case presents might not be cleanly presented in that federal court of appeals as it is here. As a general rule, "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference . . . if the prior court decision holds that its construction follows from the unambiguous terms of

the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005). The Fourth Circuit held here that Section 216 leaves no room for FERC to exercise backstop siting authority over state denials. So in a future case in another court of appeals, it is questionable whether FERC would still be able to claim *Chevron* deference for its contrary interpretation of Section 216 – an interpretation which, by hypotheses, it would not even have applied when the case was before it.

At the same time, once such a future case was appealed to federal court, parties seeking to dispute FERC's original interpretation of Section 216 and who did not participate as parties in this case (which would include any state besides New York and Minnesota) could be foreclosed from challenging that interpretation on the ground that such a challenge is untimely. *See, e.g., Pacific Gas & Elec. Co. v. FERC*, 533 F.3d 820, 824-25 (D.C. Cir. 2008) (agreeing with FERC that a party could not challenge FERC's interpretation of federal statute in the context of a case-specific proceeding because the party did not bring a pre-enforcement challenge against FERC's earlier rulemaking order). Once again, it would be far better to resolve the meaning of Section 216 now, before the legal landscape becomes cluttered with potential procedural difficulties.

b. The Solicitor General also suggests that "there is a substantial question" whether the Fourth Circuit had jurisdiction to hear this case. SG Br. 15. The Solicitor General does not explain how this case is any different from *New York v. FERC*, 535 U.S. at

15-16, in which this Court considered a state's pre-enforcement challenge to a FERC order construing the Federal Power Act. But, relying on this Court's recent decision in *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009), the Solicitor General contends that respondents failed to establish standing to challenge FERC's order construing Section 216 (or, alternatively, that FERC's construction was not ripe for judicial review). SG Br. 17-18.[2]

To the extent the Solicitor General raises legitimate concerns, the proper course would not be to deny *certiorari* but rather to grant the petition for *certiorari* and add an additional question presented, directing the parties to brief whether the Fourth Circuit had jurisdiction over the case. *See, e.g., Powerex Corp. v. Reliant Energy Servs.*, 549 U.S. 1178 (2007) (adding jurisdictional question to grant of *certiorari*); *Kansas v. Marsh*, 544 U.S. 1060 (2005) (same); *Castro v. U.S.*, 537 U.S. 1170 (2003) (same). Suffice it to say that it would be news to the energy bar – and presumably to other administrative lawyers as well – to learn that cases of this sort are nonjusticiable. *See, e.g., Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998) ("[P]re-enforcement review of agency rules and regulations has become the norm, not the

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[2] The Solicitor General also notes that FERC's interpretation of Section 216 is set forth in a "preamble issued as part of a rulemaking," not a regulation. SG Br. 15. But this has no relevance to any jurisdictional or legal issue here. As the Solicitor General herself explains, FERC's interpretation represents its "authoritative construction of a statute the agency is charged with administering." SG Br. 7.

exception."). If pre-enforcement challenges are no longer viable, this Court should say so, after taking into account the impacts of such a change on orderly agency implementation of statutes and on the regulated community that is bound by agency rules.

At the very least, this Court should grant the petition and vacate and remand (GVR) the Fourth Circuit's decision for consideration of this issue. The *Summers* decision, upon which the Solicitor General's jurisdictional argument rests, was decided in March of 2009, the month *after* the Fourth Circuit decided this case (on February 18, 2009). Pet. App. 5a. Accordingly, if the Solicitor General's jurisdictional argument has merit, the scenario she describes would fall squarely within this Court's GVR authority, which applies when new authority from this Court "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater,* 516 U.S. 163, 167 (1996).

In short, it would be not only ironic, but unjust and quite harmful to national energy policy, if this Court allowed the Fourth Circuit's decision to stand on the ground that new authority calls into question that court's very exercise of jurisdiction. This Court can, and should, avoid such an outcome.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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