No. 22-1246

In the Supreme Court of the United States

EDISON ELECTRIC INSTITUTE; NORTHWESTERN CORPORATION D/B/A NORTHWESTERN ENERGY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The decision below exemplifies a persistent "vertical split between how the Supreme Court and lower courts apply *Chevron*." Pet. App. 21a (Walker, J., dissenting). Faced with the unenviable task of defending an opinion that essentially skipped *Chevron* step one, the government barely engages with the panel's reasoning on that critical point. Instead, the government and private respondents suggest that a deferential *Chevron* step-two analysis can substitute for a rigorous step-one analysis of statutory text. That argument could not be more wrong, and underscores the need for this Court to give additional clarity and guidance on the application of *Chevron*. As for suggestions that the statutory question here is unimportant, petitioners and their *amicus* have explained that the decision below gets an exceptionally important question about the nation's energy markets squarely wrong, thereby impairing competition, complicating utilities' long-term planning, and forcing ordinary Americans to subsidize unnecessary and inefficient renewable projects.

If the Court does not grant the petition outright, it should be held pending disposition of *Loper Bright Enterprises, Inc.* v. *Raimondo*, No. 22-451, because the panel's holding rested on *Chevron* deference. On this point, the Solicitor General agrees. Gov't BIO 9-10.

ARGUMENT

I. The Decision Below Is Clearly Wrong.

A. "Power Production Capacity" Means the Maximum Amount of Power that a Facility Can Create.

1. The decision below cannot be squared with the ordinary meaning of PURPA's text, read in light of statutory structure, context, purpose, and history—under which "power production capacity" means how much power a facility can generate. See Pet. 12-20.

In resisting that straightforward conclusion, the government contends that the "key" analytical question is "whether the relevant power production capacity is that of the facility as a whole or instead only of some of its component parts." Gov't BIO 10. That is not the "key" question, or even an issue on which the litigants disagree. All agree that "facility" encompasses both the solar array and inverters. See Broadview BIO 16. The key dispute is whether "production capacity" is measured by power *generated* (160 megawatts) or power *delivered* (80 megawatts).

As to the meaning of the critical term "production," petitioners identified half a dozen dictionary definitions contemporaneous with PURPA's enactment which confirm that "production" means to "create" or "generate." Pet. 13-14 & nn.2-4. FERC has never presented a contrary dictionary definition—not in the orders under review, its brief below, or in this Court. Nor did the D.C. Circuit analyze or even identify relevant dictionary definitions—despite the dissent marshalling numerous dictionaries that squarely undercut FERC's position. See Pet. App. 24a (Walker, J.,

dissenting). In this Court, the government cites nothing to support its *ipse dixit* that it is "natural" to equate "power production capacity" with "send out." Gov't BIO 11.[1]

For its part, Broadview wrongly suggests that petitioners rely on a "component-based reading of the statute" that focuses only on the 160-megawatt solar array. Broadview BIO 11-12; see *id.* at 16, 22. But it is *respondents* who attribute talismanic significance to one component (the inverters). Petitioners, by contrast, consider all components that *generate* power. Although Broadview has only one solar array, the interpretation is not so limited. If a developer proposed a facility consisting of five 10-megawatt solar panels co-located with five 10-megawatt wind turbines, petitioners' reading would count all of those components in calculating a power production capacity of 100 megawatts—rather than looking only to one component (the inverter).

The term "capacity" also supports petitioners' reading. That word refers to the "ability to produce." Pet. 15-16 & n.8. Respondents, citing "industry-relevant definition[s]" of "capacity" debuted in FERC's D.C. Circuit brief, invite this Court to look at what "capacity" means in the "specialized context of power generation." Gov't BIO 10; see Broadview BIO 18. But the

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[1] Broadview offers one definition of "production," plucked from a modern, online dictionary never presented to FERC or the D.C. Circuit. It departs from the consensus of dictionaries contemporaneous with PURPA's enactment. And anyway, that definition ties "production" to the amount of goods "*mad[e]*"—supporting petitioners, not Broadview. Broadview BIO 17 (emphasis added).

D.C. Circuit properly declined to consider that *Chenery*-barred contention, reasoning that it was "not a basis for the Commission's decision." Pet. App. 7a.[2]

In the orders under review, the Commission said that "capacity" is "generally equated to 'output.'" Pet. App. 82a-83a. But that improperly "changes [the statutory phrase] 'power production capacity' to 'power delivery capacity,'" even though as a matter of plain meaning, "'production' means something different from 'delivery.'" *Id.* at 25a (Walker, J., dissenting).[3] When pressed at oral argument, FERC conceded that "production" and "delivery" are separate concepts. See *id.* at 25a n.4. Yet, in this Court, the government returns to an argument the agency abandoned below. Gov't BIO 10-11. The government's shifting positions highlight why the panel's reflexive invocation of *Chevron* was error.

2. PURPA's structure and context also support petitioners' reading. 16 U.S.C. § 796(17)(A)(i) equates

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[2] Broadview overreaches in suggesting that FERC's effort to reinterpret the statute on appeal makes this case a "poor vehicle." Broadview BIO 19 n.7. An agency cannot insulate its rulings from this Court's review by failing to include pertinent reasoning in its orders, drawing *Chenery* objections on appeal, and then claiming a vehicle problem. The Solicitor General conspicuously does not endorse Broadview's argument.

[3] Although Judge Walker's arithmetic varied slightly from petitioners', see Gov't BIO 11 n.*, he agreed that DC and AC power both "count as 'power'"; that the solar array "produce[s]" or "generate[s]" power; and that the calculation of maximum "capacity" is not limited to "power that a facility supplies to the electric grid." Pet. App. 23a-26a; accord Pet. 15-17. For those reasons, Judge Walker agreed that Broadview's facility has a "power production capacity" that "exceed[s] 80 megawatts." Pet. App. 27a.

"produc[tion]" with the "use" of an "energy source"—thus confirming that "production" means "generation." Pet. 17-18. The government suggests this provision "speaks to how a facility generates power, not how much power the facility produces." Gov't BIO 12-13. But that circular argument takes as its premise the very thing it seeks to prove—*i.e.*, that "production" is different from "generation."

Respondents assert that equating "production" with "net output" to the grid would supposedly "bring[] various provisions of PURPA into harmony," because utilities are only required to purchase the power that qualified facilities deliver to the grid. See Gov't BIO 11-12 (quoting Pet. App. 7a); Broadview BIO 20-21. But how much power a utility must *buy* from a qualifying facility is analytically and textually distinct from how to measure a facility's power *production* capacity. Whatever the merits of respondents' argument as a policy matter, Congress chose different words to define those inquiries. Congress could have, but did not, specify that a facility's size should be determined by how much power a utility would ultimately have to buy.

3. The briefs in opposition contain no meaningful response to petitioners' concern that FERC's orders will frustrate Congress's purpose of encouraging competition among generators, and will force consumers to subsidize qualifying facilities. See Pet. 19-20. Instead, the government reductively suggests that its position furthers a purpose of "encourag[ing] the development of * * * small power production facilities." Gov't BIO 12 (quoting Pet. App. 8a). But PURPA "does not require FERC to encourage [qualifying facilities] to the

maximum extent possible[.] * * * To the contrary, the statute makes clear that FERC must take into account at least some other considerations"—including the statutory limit on facility size. *Solar Energy Indus. Ass'n* v. *FERC*, 80 F.4th 956, 976 (9th Cir. 2023).

4. Respondents contend that the Commission's reading draws support from two agency precedents from the 1980s. Gov't BIO 3-4, 9, 10-11; Broadview BIO 1, 4. Not so. Those agency orders held only that "parasitic loads" (*i.e.*, energy used and lost in running the facility itself) could be subtracted to arrive at a net "power production capacity." *Occidental Geothermal, Inc.*, 17 FERC ¶ 61,231, p. 61,445 (1981). The decisions do not suggest that a facility capable of producing 160 megawatts of power can be deemed to have an 80-megawatt "power production capacity." See Pet. App. 118a-120a (Danly, Comm'r, dissenting) (distinguishing these precedents).

B. The D.C. Circuit's Expansive Application of *Chevron* Underscores the Need for Further Review.

1. The D.C. Circuit's *Chevron* step-one inquiry was egregiously wrong and highlights the "vertical split" of authority between lower courts and this Court. Instead of "employing traditional tools of statutory construction" to determine the statute's ordinary meaning, *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984), the panel effectively skipped straight to step two. Its step-one analysis consisted of three sentences that did not invoke any tool of statutory interpretation or reference dictionaries or other evidence of ordinary meaning. Instead, the panel suggested that anytime Congress does

not include a bespoke definition of a particular term, a statute is ambiguous. Pet. App. 6a.

The government barely attempts to defend this step-one analysis, relegating that issue to a single paragraph. Gov't BIO 15. According to the government, the court of appeals' anemic step *one* analysis is not a concern, because the panel "went on to discuss" text, purpose, and history as part of its step *two* analysis. *Ibid.*

The government's effort to collapse the two steps of the *Chevron* inquiry is at odds with this Court's repeated admonition that courts cannot ask whether an agency has reasonably filled a gap without first ascertaining whether there is actually a gap to fill. See *Esquivel-Quintana* v. *Sessions*, 581 U.S. 385, 397-398 (2017) (consulting dictionaries and applying canons of statutory interpretation at step one, and finding it unnecessary to proceed to step two). And the government misreads the opinion below in suggesting that, at step two, the D.C. Circuit "applied the traditional tools of statutory interpretation, *without deference to the agency*." Gov't BIO 15 (emphasis added). To the contrary, the panel explicitly and repeatedly framed its step-two analysis as asking whether FERC's position was "reasonable." See Pet. App. 6a, 7a, 10a.

Respondents separately assert that certiorari is unwarranted where a lower court's error was merely a "misapplication" of established law. Gov't BIO 15 (internal quotation marks omitted); see Broadview BIO 25-26 & n.8. But the panel did *not* simply misapply existing standards; instead, it invented a rule that the absence of an express statutory definition for a term justifies a court finding ambiguity and proceeding to

Chevron step two. See Pet. App. 18a-19a (Walker, J., dissenting); Pet. 4. That proposition will have sweeping consequences for how judges interpret statutes in a court of appeals that plays an outsized role in policing the boundaries of federal agency authority. The panel's reasoning also runs headlong into the proposition "that *Chevron* step one has teeth: * * * [J]udges must actually do the hard work of statutory interpretation," and "can't just skip ahead to step two." *Bastias* v. *U.S. Att'y Gen.*, 42 F.4th 1266, 1277 (11th Cir. 2022) (Newsom, J., concurring), pet. for cert. pending, No. 22-868 (filed Mar. 10, 2023).

2. The flaws in the panel's *Chevron* step-two inquiry further underscore the need for clarity from this Court. The panel consulted no dictionaries or other evidence of plain meaning. The step-two analysis effectively rests on the notion that the statutory word "power" means only "AC power"—a conclusion so obviously wrong that neither brief in opposition bothers to defend it.[4]

The panel's step-two analysis also disserves Congress's instruction that qualifying facilities be "small." 16 U.S.C. § 796(17)(A). The decision here would allow the 579-megawatt Solar Star Project to qualify as a "small" facility, so long as its generation equipment is upstream of an 80-megawatt inverter. Pet. 24-25. Broadview does not dispute the point. For its part, the government suggests that the facility might be disqualified if it produced "usable AC power" for behind-

[4] As Judge Walker explained, Congress knows how to specify "AC power" when it so intends. See Pet. App. 24a (citing 26 U.S.C. § 48E(a)(2)(A)(ii)).

the-meter purposes—but it makes no similar assurance for a facility that may produce considerable DC power for use on-site. Gov't BIO 14-15. More generally, the court of appeals upheld an agency order establishing a "net output to the electric utility" test for "power production capacity" that does not turn on behind-the-meter uses. Pet. App. 45a. That this test will generate "absurd results" when applied to examples such as Solar Star is a powerful reason to find it "unreasonable" and "invalid." *Dominion Res., Inc.* v. *United States*, 681 F.3d 1313, 1317-1319 (Fed. Cir. 2012).

C. At a Minimum, the Petition Should Be Held for *Loper Bright*.

If this Court does not grant the petition now, it should be held pending *Loper Bright*. The Solicitor General agrees that, "[b]ecause the court of appeals relied on *Chevron* to uphold the Commission's interpretation as reasonable," it "would be appropriate for the Court to hold the petition in this case pending its decision in *Loper Bright*." Gov't BIO 16.[5]

Broadview suggests a hold is unnecessary because (in its view) its interpretation of the statute is the "only sensible reading," such that (again in its view) the result would not change on remand even if *Chevron* is overruled. Broadview BIO 2, 28. The Commission, the Solicitor General, and the D.C. Circuit disagree. Pet. App. 81a & n.68 (FERC describing PURPA as

[5] This Court appears to be holding other petitions for *Loper Bright*, where (as here) the lower court's ruling rested on *Chevron* deference. *E.g.*, *Diaz-Rodriguez* v. *Garland* (No. 22-863); *Kerr* v. *Garland* (No. 22-867); *Bastias* v. *Garland* (No. 22-868).

"ambiguous" and open to "multiple interpretations"); *id.* at 6a-7a (same, for D.C. Circuit); Gov't BIO 10-11 (claiming only that PURPA is "reasonably susceptible" to FERC's reading). Given the significant daylight between Broadview and the government on this key interpretative question, it will advance (not undermine) reliance and "certainty" interests to hold this case for a few additional months, so that the judiciary can review the Commission's orders under the correct legal framework. Cf. Broadview BIO 28-29.

Broadview twice claims that the D.C. Circuit found petitioners' interpretation of the statute to be "'inconsistent' with PURPA." Broadview BIO 27, 28 (quoting Pet. App. 8a). That is plainly wrong. If the D.C. Circuit had found either side's reading to be "inconsistent" with PURPA, there would have been no reason to include such a lengthy discussion of reasonableness at *Chevron* step two; the panel could have resolved the case at step one, thus avoiding the dissent's *Chevron*-focused concerns. What the D.C. Circuit actually said (albeit incorrectly) was that one of petitioners' textual arguments was purportedly inconsistent with one of the "*goal[s]*" of PURPA ("to encourage the development of . . . small power production facilities")—not that petitioners' interpretation was inconsistent with the statutory text as a whole. Pet. App. 8a (emphasis added). But see pp. 5-6, *supra*.

Broadview also says that *Loper Bright* involves different statutes and different facts. Broadview BIO 28-29. But both cases raise questions about when and whether *Chevron* deference is appropriate, in reviewing agency action that allegedly contravenes the relevant enabling statutes. And any factual

differences between the two cases are irrelevant, because this Court granted certiorari in *Loper Bright* to consider whether to "clarify" or "overrule *Chevron*" outright. Pet. i-ii, No. 22-451. If this Court does overrule *Chevron*, that holding would directly undercut the express basis for the D.C. Circuit's judgment below. Following vacatur and remand, the D.C. Circuit could consider, under the correct legal standard, respondents' various statutory arguments, including about what authority Congress has delegated to FERC here (Broadview BIO 29).

II. This Case Is an Ideal Vehicle to Address Exceptionally Important Issues.

Broadview's contention that this case is not "important" is difficult to take seriously. Broadview BIO 13-14. *Amicus curiae* PacifiCorp has explained that the D.C. Circuit's ruling will have significant practical effects for utilities nationwide because it will "undermine[] competitive solicitations and utility planning," impose "substantial burdens on the energy grid and utilities," "incentivize[] unnecessary and economically inefficient generation projects," and "saddle[] [customers] with the costs of mandatory purchases at above-market prices." *Amicus* Br. 4, 14, 17; accord Pet. App. 16a (Walker, J., dissenting). A former FERC Chairman, who participated in the agency orders under review, agrees. Pet. 33; but cf. Broadview BIO 2 (wrongly denigrating those views as "a tweet"). Indeed, Broadview itself touts a key design feature here as "standard practice in the solar industry" (Broadview BIO 6) and its counsel have elsewhere characterized FERC's decision "as an important

development" that will invite more developers to "pair[] solar array and battery storage systems."[6]

Broadview suggests that this case "does not implicate [any] broad concerns" regarding the integration of renewable resources into the electric grid because the only thing at issue here is "the particular configuration of the Broadview facility." Broadview BIO 14. That argument is not credible. PURPA was designed to create economic incentives to build qualifying facilities and then force utilities to buy their power. The first question presented here goes to the *scope* of that incentive, controlling what kinds of (and how many) facilities will qualify. It is hard to imagine a case that more directly implicates concerns about the integration of renewable generation into the grid.

Finally, Broadview suggests that that the D.C. Circuit's ruling is "unlikely to matter" within organized electricity markets. Broadview BIO 14-15. But although the size cap for qualifying facilities seeking to invoke the mandatory purchase obligation in the organized markets is 5 megawatts, not 80 megawatts, the principles underlying the D.C. Circuit's decision will encourage developers to game the 5 megawatt threshold as well, in search of a guaranteed market for power produced by their own oversized facilities.

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[6] *Orrick Team Secures FERC Win for Solar + Storage Facilities Under PURPA*, Orrick (Apr. 9, 2021), https://tinyurl.com/52c7368n; see also CADC JA131-158 (Broadview emphasizing importance of this case in requesting rehearing of FERC's initial adverse order).

CONCLUSION

The petition for a writ of certiorari should be granted. At a minimum, the petition should be held pending *Loper Bright* and then disposed of accordingly given this Court's decision in that case.

Respectfully submitted.

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